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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

Nos. ~~223, 224~~ 120 & 124

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLANT,

vs.

JOHN A KNOTT ET AL.

BRIEF OF JARED HOW AS AMICUS CURIÆ.

CIRCUIT COURT OF THE UNITED STATES

DISTRICT OF MINNESOTA,

THIRD DIVISION.

DAVID C. SHEPARD

VS.

NORTHERN PACIFIC RAILWAY COMPANY, et al.

EMMA B. KENNEDY, et al.

VS.

GREAT NORTHERN RAILWAY COMPANY, et al.

WILLIAM SHILLABER

VS.

MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY, et al.

MINNESOTA RATE CASES.

Statement of the Case and a Portion of the Argument in behalf of Complainants, being that upon the Question of Interference with Interstate Commerce.

THE PIONEER COMPANY
PRINTERS AND BINDERS
ST. PAUL, MINN.

STATEMENT OF CASE.

The suits in which this argument is made are three of nine several suits instituted nearly simultaneously by stockholders of railway companies doing business in Minnesota as complainants against the respective railway companies of which the respective complainants are stockholders, the Attorney General of the State of Minnesota and the members of the Railroad and Warehouse Commission of the State of Minnesota as defendants. In some of the suits there were joined as parties defendant certain representative patrons of the defendant railway company in the matter of both freight and passenger transportation.

The bills of complaint in the respective cases now argued are not precisely alike, but all have to do with substantially the same grievances and all pray substantially the same relief.

The historical facts leading up to the facts upon which the grievances of the complainants are predicated, the facts which serve as the basis of the relief sought in the suits and the relief prayed in the respective bills of complaint, are as follows:

The Railroad and Warehouse Commission of the State of Minnesota as now constituted and empowered was created by the legislature of the State by Chapter 10, General Laws of Minnesota for the year 1887, as amended by Chapter 106 General Laws of Minnesota for the year 1901. The powers granted to the Commission by the legislature so far as principally material to be considered in these suits are as set forth in Sections 1969 and 1970 of the Revised Laws of Minnesota 1905 as follows:

"1969. Complaint that rate is unreasonable—Duty of Commission.—Upon the verified complaint of any person or of any corporation, private or municipal, that any tariff of rates, fares or charges, or any part thereof, or of any classification is unequal or unreasonable, the Commission shall proceed to investigate the matters alleged in such complaint, and for the purposes of such investigation they may require the attendance of witnesses and the production of books, papers and documents. If, upon the hearing, such tariff of rates, fares, or charges, or any part thereof, or of such classification, is found to be unequal or unreasonable, the Commission shall make an order stating wherein the same are so unequal or unreasonable, and shall make a tariff of rates, fares, charges and classification which shall be substituted for the tariff so complained of. The tariff so made by the Commission shall be deemed *prima facie* reasonable in all courts and shall be in full force during the pendency of any appeal or other proceedings to review the action of the Commission in establishing the same."

"1970. Investigation without complaint.—The Commission shall also of its own motion investigate any matter relating to the management by any such carrier or warehouseman of its business or the reasonableness of any rates, fares, charges, or classifications, whenever, in its judgment, the public interests require it, and in such case the procedure shall be, as nearly as may be, as provided upon the filing of a complaint, and the findings and order in such case shall have the same effect as those made upon complaint."

Prior to 1905 the Commission seems to have limited its activity in the matter of rates to the correcting of what seemed to it to be inequality or discrimination either as between two state rates or as between state rates and interstate rates. Complaints to the Commission were invariably based on one of two claims: either that somebody else in the same town or a nearby town was getting a better rate than the complainant or that the rate for the mileage to complainant's town was unreasonably high as compared with the rate to another town upon the same line of railroad or as compared with the rate to towns

equally distant from the terminal on other lines of railroad. These complaints were generally confined to rates upon some particular commodity. (Staples, page 2610, N. P.)

Pursuant to such complaints the Commission had made adjustments of rates—of grain rates, coal rates, lumber rates and live stock rates (ibid.). The adjustment of the grain, coal and lumber rates was on complaint of Litchfield, Minnesota, and affected all the chief carrying lines of the State (ibid., page 2766) and even affected interstate rates (ibid., page 2770) although aimed only at the relief of Litchfield which lies on the Great Northern line 66 miles from Minneapolis. The adjustment of the cattle rates was made in order to re-establish the relation in rates between Southern Minnesota on the one hand and Chicago and South St. Paul on the other which had formerly existed and had been destroyed by a reduction which the railroads had made in rates from Southern Minnesota to Chicago (ibid., page 2763).

The legislature of Minnesota in its Session of 1905 adopted a resolution (April 6, 1905), reciting that the Commission was "the only body properly equipped to undertake the work of securing an equitable, intelligent and fair adjustment of the rate situation in this State" and directing the Commission "to undertake the work of securing a readjustment of the existing freight rates in this State which will give a more uniform system of rates throughout the State and a uniform scale of percentages which each class rate shall bear to the first class, the readjustment to secure a substantial reduction in the existing merchandise rates." (Ibid., pages 2622, 2632.)

The legislature at the same Session provided funds which the Commission considered necessary for ascertaining the physical valuation of the railroad properties in the State (ibid., page 2622). But it was not until about Jan. 15, 1906, that the work of ascertaining this physical valuation was begun and it was not until late in the year 1908—long after these suits were

instituted (Morgan, page 1765, Ex. Morgan N. P.) that it was completed and reported to the Commission. The work was entrusted by the Commission to Mr. Dwight C. Morgan and up to the time of his employment in January, 1906, the Commission appears to have been wholly without any data or information upon which to form an estimate of the valuation of any railway properties in the State (ibid., page 1972-3).

Without any information as to the physical valuation of the railroad properties in the State and especially as to that portion of such valuation which it should be proper to use as a base for a reasonable return to the railway companies out of their state business, without having determined the cost to the railway companies of doing business within the State (ibid., pages 2730-1), indeed without any figures showing what proportion of the revenues of the railways out of Minnesota business was derived from intrastate business and what from interstate business touching Minnesota (Johnson, pages 1700-5 N. P., Exhibit 1 Master N. P.), the figures theretofore reported by the companies as to this matter having been largely in excess of the true figures, the Commission in December, 1905, completed an entire schedule of rates for the transportation of merchandise within the State, issued to the various railway companies its order to show cause why this schedule should not be promulgated, summarily closed the taking of testimony on the question of the propriety and sufficiency of the rates on the first of September, 1906, refused the request of counsel for the railway companies for time for the preparation of an argument, and, under date September 6, 1906, promulgated its Order that the schedule in all respects as by it originally prepared should be put into effect by each railway company on the 15th of November, 1906. (Staples, pages 2739-45 N. P.)

The schedule of rates set forth in the Order was such that each rate for each class for any distance bore such an exact relation to each other rate that, given one rate out of the

schedule, any other rate could be ascertained by mathematical calculation and without reference to the schedule itself. The plan of the schedule is this:

For first class merchandise an allowance of 11.02 cents per cwt. is made for terminal charges and for each five miles or fraction thereof up to 200 miles .98 of a cent for hauling charge; so that for a distance of five miles the rate is 12 cents per cwt., for a distance of ten miles the rate is 12.98 cents per cwt. and for a distance of 200 miles the rate is 50.22 cents per cwt. After a distance of 200 miles is reached .98 of a cent is allowed per cwt. as a hauling charge for each 10 miles or fraction thereof up to 400 miles; so that the rate for 200 miles being 50.22 cents per cwt. the rate for 210 miles is 51.20 cents, for 220 miles the rate is 52.18 cents and for 400 miles the rate is 69.82 cents per cwt. After a distance of 400 miles is reached .98 of a cent is allowed as a hauling charge per cwt. for each 20 miles or fraction thereof up to 500 miles; so that the rate for 400 miles being 69.82 cents per cwt. the rate for 420 miles is 70.80 cents and the rate for 500 miles is 74.72 cents per cwt.

The rates for classes other than the first class are a fixed per centum of the corresponding rates for the first class, those for the second class being 83⅓%, of the third class being 66⅔%, of the fourth class being 50%, of the fifth class being 40%, of Class A being 45%, of Class B being 35%, of Class C being 30%, of Class D being 25% and of Class E being 20%.

The rates prescribed are maximum terminal rates and may be increased by five per centum for shipments between stations neither of which is a terminal or distributing station.

The classification used is the Western Classification "with exceptions and changes made by the Railroad and Warehouse Commission of the State of Minnesota."

The reduction in merchandise rates made by the Order of Sept. 6, 1906, was from 20% to 25% (Staples, page 2740 N. P.) but notwithstanding the extent of the reduction all the rail-

way companies interested put the rates prescribed by the Order into effect on the 15th of November, 1906, and they ever since have been and still are maintained by all the companies concerned as maximum rates for the transportation within the State of merchandise covered by the Order.

At the same time that the Commission was considering the schedule afterwards incorporated in its Order of Sept. 6, 1906, it was also considering a reduction in rates for transportation within the State of commodities in car-load lots not covered by the Order. Because of the agitation with regard to commodity rates (Maguire, page 800 G. N.) the three northern systems in the State, the Great Northern, the Northern Pacific and the Minneapolis, St. Paul and Sault St. Marie Companies, voluntarily reduced their rates on grain approximately 10% by filing schedules effective Sept. 1, 1906, and their rates on hard and soft coal at least 10% (Ex. 40—Maguire G. N.) by filing schedules effective October 22, 1906. (Staples, pages 2746-7, N. P.)

Notwithstanding these voluntary reductions and the reductions caused by the Order of Sept. 6, 1906, the Commission under date December 14, 1906, effective by its terms January 26, 1907, made its second order reducing rates for transportation within the State of grain, coal, lumber and live-stock. The reduction effected averaged from 10% to 28½% or a general average of 17.37% in addition to the voluntary reductions in rates on grain and coal made by the three northern systems as above recited. (Staples, pages 2740, 2752 N. P.)

In January, 1907, the railroad companies affected by this second order, being all that are parties defendant to the nine pending suits as above set forth, procured an injunction from the Circuit Court of the United States for the District of Minnesota forbidding the enforcement by the Commission of its second order. Thereupon the legislature of the State, which convened early in January, 1907, enacted Chapter 232 General Laws of Minnesota for the year 1907, approved April 18, 1907,

and effective by its terms June 1, 1907, fixing a new schedule of commodity rates in all respects like the schedule comprehended in the second order of the Commission excepting that the reduction in rates provided by it was 7.37% less than that provided by the Order. (Staples, pages 2752-3, N. P.) In Chapter 232 the legislature creates seven new classes, numbered respectively from 11 to 17. Wheat and thirteen other articles are placed in Class 11, corn and thirty-seven other articles in Class 12, lumber and five other articles in Class 13, sheep in double-decked cars and cattle in Class 14, sheep in single-decked cars and hogs in Class 15, hard coal in Class 16, and soft coal in Class 17. There is no fixed percentage relation between the classes and no regular rate of progression of the various rates with increasing distance. In other respects, however, the method of making the schedules is similar to that adopted by the Commission in its Order of Sept. 6, 1906. The hauling charge comprehended in the rates for each class decreases with increasing distance and becomes very small for the added mileage for distances between 300 and 400 miles, which is the limit of distance covered by the Act. On Class 11 the difference between the rate for 300 miles and that for 400 miles is 1.1 cents per cwt. amounting to 2.2 mills per ton per mile; on Class 12 the difference is one cent per cwt. or two mills per ton per mile; on Class 13 it is 2.2 cents per cwt. or 4.4 mills per ton per mile; on Class 14 it is 2.2 cents per cwt. or 4.4 mills per ton per mile; on Class 15 it is 1.5 cents per cwt. or three mills per ton per mile; on Class 16 it is 34 cents per ton or 3.4 mills per ton per mile; and on Class 17 it is 18 cents per ton or 1.8 mills per ton per mile.

Meantime and at the same session of the legislature it had passed the so-called two cents passenger law, being an act approved April 4, 1907, effective by its terms May 1, 1907, prescribing as maximum rates for the transportation of passengers within the State two cents per mile for passengers of twelve

years of age or over together with baggage not exceeding 150 pounds in weight, and one cent per mile for passengers under twelve years of age together with baggage not exceeding 75 pounds in weight. The maximum theretofore had been three cents for adult passengers (Staples, page 2774, N. P.) and the Commission had considered as late in any event as 1903 that this maximum ought not to be reduced. (Ibid., pages 2908-9.)

Prior to the taking effect of the Order of Sept. 6, 1906, the various railway companies in the State had maintained car-load in-rates from St. Paul, Minneapolis and Duluth to various "distributing stations" in the State for the purpose of supplying wholesale distributing houses. In its Order of Sept. 6, 1906, the Commission provided that "In case the Railway Company in putting in a new schedule of rates fails to so adjust the 'in' rates as to protect the jobbers at the distributing stations other than St. Paul, Minneapolis and Duluth, the Commission will undertake to make the necessary adjustment." Apparently the railway companies did not adjust these in-rates to the satisfaction of the Commission and by its Order to each company under date May 3, 1907, effective June 3, 1907, the Commission prescribed certain maximum car-load rates from St. Paul, Minneapolis, Minnesota Transfer and Duluth to various designated distributing stations and covering various designated commodities. (Staples, page 2754, Ex. 2 to Amended and Supplemental Bill of Complaint, N. P.) Exhibit 69—Staples N. P. shows that the average reduction in rates covered by this Order of the Commission was on the Northern Pacific road 13.577%. This Order of May 3, 1907, was, in a way, supplemental to the Order of Sept. 6, 1906. It was intended to re-establish the relation of rates theretofore existing between less-than-car-load rates from the cities of St. Paul, Minneapolis and Duluth to localities in general within the State on the one hand and car-load rates from those cities to the less important distributing stations plus less-than-car-load rates out of such

stations to localities in general in the State on the other hand.

Summarized, then, the reductions in rates which may be charged by railway companies for transportation within the State of Minnesota due to the anti-railway agitation of the years 1905-6-7 are as follows:

(a) Reductions in rates on grain and coal amounting to 10%.

(b) Reduction in rates on general merchandise amounting to from 20% to 25%.

(c) Reduction in rates on passengers amounting to 33⅓%.

(d) Reduction in rates on grain, coal, live-stock and lumber amounting to 10% in addition to the reduction on grain and coal as shown by (a.)

(e) Reduction in in-rates in distributing stations amounting to 13.58%.

All these reduced rates were adopted by the railroad companies doing business in the State excepting the commodity rates prescribed by Chapter 232 Gen. Laws Minn. 1907—the reduced rates on grain, coal, live-stock and lumber. Prior to the time when by the terms of the Act these rates would have become effective, that is to say in the latter part of May, 1907, stockholders in nine several railroad companies subject to the acts and orders brought suit against the respective railway companies in which they were stockholders, the Attorney General of the State of Minnesota and the members of the Railroad and Warehouse Commission of the State of Minnesota. In some of these suits various persons doing business in Minnesota were joined as parties defendant in their capacity as representative patrons of the company with which they were joined as defendants both in the matter of freight and of passenger transportation.

The bills of complaint in these three suits, although not wholly alike, complain of the same grievances and seek the same relief. They each aver facts sufficient to confer jurisdiction on

the federal courts; the promulgation of the Order of Sept. 6, 1906, and that of May 3, 1907, and the enactment of the laws of April 4, 1907, and April 18, 1907, that the defendant railway company has put into effect the rates prescribed by the Order of Sept. 6, and the Act of April 4, and threatens to put into effect those prescribed by the Act of April 14 and the Order of May 3, 1907; that each of the Acts and Orders operate directly and necessarily upon interstate commerce and are a regulation of that commerce in violation of the exclusive power in that regard granted to Congress by the Constitution; that the effect of the prescribed rates will be to deprive the defendant railway company of a fair return upon the reasonable value of its property and so to deprive it of its property without due process of law in violation of the Constitution of the United States; that prior to the institution of the suit the complainant made demand on the defendant railway company that it refuse to put the reduced rates into effect and that it should by proper legal proceedings test the legality of the prescribed rates, and that this demand was refused; that the suit was not a collusive one to confer on the Court of the United States jurisdiction of a case of which it would not otherwise have cognizance; that if the defendant railway company should cease obedience to the Order of Sept. 6, 1906, or the Act of April 4, 1907, or refuse obedience to the Act of April 18, 1907, or the Order of May 3, 1907, the defendant Attorney General of the State of Minnesota and the defendants members of the Railroad and Warehouse Commission of the State of Minnesota would institute mandamus and other proceedings to enforce the laws and orders and all the provisions thereof.

The relief prayed in the bills of complaint is that the Acts and Orders and each of them be declared to be in violation of the Constitution of the United States and therefore void; that the defendant railway company and its officers and employes be temporarily and permanently enjoined from continuing in

force the rates fixed by the Order of Sept. 6, 1906, or those fixed by the Act of April 4, 1907, or from adopting the rates fixed by the Act of April 18, 1907, or the Order of May 3, 1907; that the defendants the members of the Railroad and Warehouse Commission and the Attorney General be enjoined temporarily and permanently from attempting to enforce the orders, or either of them, or taking any action to enforce any penalties against the defendant railway company or any of its officers or employes for the violation of such Orders or either of them; that the defendant Attorney General be enjoined temporarily and permanently from taking any action to enforce against the defendant railway company or any of its officers or employes the penalties prescribed by either of the Acts in question; that the defendant patrons of the defendant railway company and all other persons affected by the suit be enjoined temporarily and permanently from instituting any action for the violation of such Orders and Acts or either of them or from demanding that any of the rates fixed by such Orders or Acts or either of them be given them.

The Minneapolis and St. Louis bill of complaint did not complain of the Order of May 3, 1907, nor were there in that suit any representative shippers and passengers joined as parties defendant.

Upon the filing of the bills of complaint an order to show cause why a temporary injunction should not issue in accordance with the prayer in the bills of complaint was issued by the Court, Lochren, J., and in the meantime restraining the defendant railway company from putting into effect the rates prescribed by Chapter 232 Gen. Laws Minn. 1907, and the defendant Attorney General from seeking to enforce the provisions of that Act until further order of the Court in the premises, and the representative shippers from demanding the reduced rates fixed by that law.

The defendant Edward T. Young, Attorney General of the

State of Minnesota, appeared specially in each of the suits and moved to dismiss the bill of complaint as to him for the reason that the suit against him was a suit against the State of Minnesota; and the defendants members of the Railroad and Warehouse Commission moved in each suit to discharge the restraining order as to them for the reason that the suit as to them was a suit against the State, and for other reasons. These motions, together with the question as to whether if it should be determined upon a final hearing of the order to show cause that a temporary injunction shall issue it shall include the defendant Edward T. Young, came on for hearing before the Court, Lochren, J., on July 8, 1907, and were each denied, and the Court held that if on the hearing of the motion for a temporary injunction it was determined that such injunction should issue, it should include the defendant Edward T. Young as Attorney General of the State of Minnesota.

The defendant Edward T. Young and the defendants members of the Commission interposed separate demurrers to the bill of complaint in each suit; and these demurrers, together with the order to show cause why a temporary injunction should not issue, were brought on for hearing on the 3d of September, 1907. In the meantime the suit of Henry A. James against the same defendants as were named in the suit of John S. Kennedy *et al.* against the Great Northern Railway Co. *et al.* had been instituted, and these two suits had been consolidated by order of the Court in the premises.

On the 20th of September, 1907, the Court entered its Order overruling each demurrer theretofore interposed, and its further Order enjoining the defendants and each of them as prayed in the respective bills of complaint so far as Chapter 232 Gen. Laws Minn. 1907, prescribing rates on certain commodities was concerned. So far as concerned the Order of the Commission dated Sept. 6, 1906, and the two cent passenger rate law, the rates fixed by which had been put into effect prior

to the time of the beginning of the suits, and the Order of the Commission dated May 3, 1907, action as to which ought to be perhaps a mere corollary to that upon the Order of Sept. 6, 1906, the temporary injunction was refused by the Court.

The writ of injunction was served on the defendant Edward T. Young on the 24th of September, 1907, and, on the same day he, as Attorney General of the State of Minnesota, on petition filed in the District Court for the County of Ramsey, State of Minnesota, procured an alternative writ of mandamus directed to the Northern Pacific Railway Company commanding it to obey the provisions of Chapter 232 Gen. Laws Minn. 1907, or show cause to the Court for its failure to do so.

Upon affidavit of one of the solicitors for the complainants in the suit against the Northern Pacific Company the Court under date October 11, 1907, issued its order directed to defendant Young and commanding him to show cause why he should not be punished as for a contempt for his failure to obey the order for a temporary injunction in the Northern Pacific suit. Upon return of this order and on October 21, 1907, the defendant Young was adjudged by the Court guilty of contempt and ordered to pay a fine of $100 and to stand committed to the custody of the United States Marshal until he should pay the fine and should purge himself of contempt by dismissing the mandamus action which he had instituted.

Forthwith the defendant Edward T. Young filed with the Supreme Court of the United States his petition for a writ of *habeas corpus*, and that Court issued its order addressed to the United States Marshal and directing him to show cause why a writ should not be granted. The order was returnable December 2, 1907, and the matter was argued to the Court on that day. A decision was rendered March 23, 1908, that the petition should be dismissed. (*Ex parte* Young, 209 U. S. 203.)

In the meantime the defendant Edward T. Young and the defendants Mills, Young and Staples had filed separate an-

swers in each of the suits. Perhaps the portions of the answers which will be chiefly relied on by the answering defendants are those containing denials that the prescribed rates are confiscatory and that they necessarily interfere with regulation of interstate commerce.

The complainant Charles E. Perkins in the Northern Pacific suit having died, an order was entered by the Court under date April 20, 1908, continuing the suit in the name of David C. Shepard, the surviving complainant, in the same manner and to the same effect as if instituted by him originally as sole complainant.

On the 20th of April, 1908, the complainant David C. Shepard in the Northern Pacific suit filed an Amended and Supplemental Bill of Complaint to which on the 16th of May, 1908, the defendants Edward T. Young, Attorney General, and Mills, Staples and Young, members of the Commission, filed a joint answer. The Amended and Supplemental Complaint differs from the original complaint in that it sets up with greater detail facts which are claimed to show interference with interstate commerce, some of which have occurred or become manifest since the time of filing the original complaint.

The complainant John S. Kennedy in the consolidated Great Northern suit having died, an order was entered by the Court under date April 19, 1910, substituting as parties complainant, in place of said John S. Kennedy, Emma B. Kennedy, Robert Eliot Tod, Robert W. De Forest and William Stewart Tod, as executrix and executors respectively of the will of said John S. Kennedy.

The terms of office of defendant Edward T. Young as Attorney General, and of defendant William E. Young as a member of the Railroad Commission, having expired, an order was entered by the Court under date January 4, 1910, substituting as parties defendant George T. Simpson, who had been duly elected as and was then and is still Attorney General of the

State of Minnesota, in place of said Edward T. Young, and Charles E. Elmquist, who had been duly elected as and was then and is still a member of the Railroad and Warehouse Commission of the State of Minnesota, in place of said William E. Young.

On the 4th day of May, 1908, the Court made its order in each of the cases, appointing Honorable Charles E. Otis of St. Paul, Minnesota, Master in Chancery with power and duty "to examine the evidence, to make the necessary computations, and to find and state the facts so found and the results of such computation, and to recommend to the Court in his report a form of a proper decree herein."

The taking of testimony in the Northern Pacific suit was begun on the 4th day of June, 1908, in the Minneapolis and St. Louis suit on the 4th day of August, 1908, and in the Great Northern suits on the 15th day of March, 1909.

A stipulation has been made that the cases shall be argued together and that any part of the record in any suit may be used with full force and effect in any other suit.

The topics to be considered in this argument are as follows:

I.

Each of the Laws and Orders complained of in these suits is void for the reason that it is violative of Section 8, Article I, of the Constitution of the United States, providing that "The Congress shall have power—To regulate commerce with foreign countries and among the several States and with the Indian tribes."

II.

The Railroad and Warehouse Commission had no power to make the Orders of September 6, 1906, and May 3, 1907, and the said Orders are therefore null and void.

III.

The Laws and Orders complained of are void for the reason that they do not and will not yield to the respective Railway Companies concerned a revenue sufficient to provide a reasonable return on the fair value of the property employed in rendering the service covered by the rates.

IV.

Both the Acts of the Legislature and the Orders of the Railroad and Warehouse Commission being by their express terms of general application to all railroads doing business in the State of Minnesota, if invalid or inoperative as to any, are inoperative as to all.

ARGUMENT

I.

EACH OF THE LAWS AND ORDERS COMPLAINED OF IN THESE SUITS IS VOID FOR THE REASON THAT IT IS VIOLATIVE OF SECTION 8, ARTICLE I, OF THE CONSTITUTION OF THE UNITED STATES PROVIDING THAT

> **"THE CONGRESS SHALL HAVE POWER—TO REGULATE COMMERCE WITH FOREIGN NATIONS AND AMONG THE SEVERAL STATES AND WITH THE INDIAN TRIBES."**

A.

Principles of construction of the Commerce Clause of the Constitution.

One of the principal necessities for the adoption of the Constitution by the United States was that of a central control of commerce among the States. General history, perhaps, may lay more importance upon that portion of the Commerce Clause of the Constitution which gives the Congress power to regulate commerce with foreign nations than upon that which gives it power to regulate commerce among the States; but a close examination into conditions existing immediately prior to the Convention discloses that the commercial relations between the States themselves were cause for greater alarm so far as

concerned the peace and prosperity of the people than the relations of the several States with foreign nations. Fiske in his "The Critical Period of American History" and in his chapter entitled "Drifting Toward Anarchy" says that in this period the States "began to make commercial war upon one another"; that Connecticut laid duties upon importations from Massachusetts; that "Pennsylvania discriminated against Delaware, and New Jersey pillaged at once by both her greater neighbors was compared to a cask tapped at both ends."

Instances of discrimination in commerce by one State against another are given by McMaster in Vol. 1 of his History of the People of the United States, as follows:

New York City had for a long time been supplied with firewood by vessels which came up through Hell Gate from Connecticut, and with vegetables, fruit and fowls by shallops which came across from New Jersey. In 1787 the New York Assembly passed an act providing that every shallop, wood-boat or sloop from New Jersey should be entered and cleared at the Custom House in the same manner as packets from foreign ports; and placed similar restrictions upon boats through Hell Gate from Connecticut.

New Jersey retaliated by placing a tax of $1,800 per year on four acres at Sandy Hook which was within the State of New Jersey and had been purchased by New York for the purpose of maintaining a light-house. Connecticut did not retaliate officially, but a league of merchants bound its members under a severe penalty not to send into New York any article whatever, nor to furnish any craft bound for that State with any kind of lading for one year. The agreement was kept, but before the expiration of the year the Constitution had been framed. It is Fiske's view (ibid. p. 175) that "but for the good work done by the federal convention another five years would scarcely have elapsed before shots would have been fired and seeds of perennial hatred sown on the shores that look

toward Manhattan Island" so great was the bitterness engendered by the discriminatory measures of States against each other.

See also Cook v. Pennsylvania, 97 U. S. at p. 574.

It is not surprising, therefore, that in Gibbons v. Ogden, 9 Wheaton 1 (1824), at p. 231, it is declared by the Court that

> "if there was any one object riding over every other in the adoption of the Constitution, it was to keep the commercial intercourse among the States free from all invidious and partial restraints,"

and that in the Passenger Cases, 7 Howard 283 (1848), at p. 445 the Court said:

> "Before the Constitution existed the States taxed the commerce and intercourse of each other. This was the leading cause of abandoning the confederation and forming the Constitution. More than all other causes it led to the result."

Nor is it surprising that when the first attack was made upon the possession of the power by Congress and its extent in 1824 the Court should have upheld it to the full extent, saying in Gibbons v. Ogden, *supra*:

> "This power like all others vested in Congress is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed by the Constitution."

Again in Brown v. Maryland, 12 Wheat. 446 (1827), the Court said:

> "It may be doubted whether any of the evils proceeding from the feebleness of the Federal Government contributed more to that great revolution which introduced the present system than the deep and general conviction that commerce ought to be regulated by Congress. It is not, therefore, a matter of surprise that the grant should be as extensive as the mischief and should comprehend all

> foreign commerce and all commerce among the States. To construe the power so as to impair its efficacy would tend to defeat an object in the attainment of which the American public took and justly took that strong interest which arose from a full conviction of its necessity."

Supplemented by the case of Groves v. Slaughter, 15 Peters 449 (1841), in which Mr. Justice Baldwin said:

> "that the power of congress 'to regulate commerce among the several States' is exclusive of any interference by the States has been, in my opinion, conclusively settled by the solemn opinions of this court in Gibbons v. Ogden, 9 Wheat. 186-222, and in Brown v. Maryland, 12 Wheat. 438-446,"

it would seem that the extent and exclusiveness of the power of Congress to regulate commerce among the several States had been finally and completely settled. But it appears that it had not been. In the License Cases, 5 Howard 504 (1847), Chief Justice Taney said:

> "It is well known that upon this subject a difference of opinion has existed and still exists among the members of this Court. But with every respect for the opinion of my brethren, with whom I do not agree, it appears to me to be very clear that the mere grant of power to the general government can not upon any just principles of construction be construed to be an absolute prohibition to the exercise of any power over the same subject by the States. The controlling and supreme power over commerce with foreign nations and the several States is undoubtedly conferred upon congress. Yet, in my judgment, the state may, nevertheless, for the safety or convenience of trade, or for the protection of the health of its citizens, make regulations of commerce for its own ports and harbors, and for its own territory; and such regulations are valid unless they come in conflict with a law of congress."

But shortly after, in Cooley v. Board of Wardens, 12 Howard 299 (1851), the Court said:

"The grant of commercial power to congress does not contain any terms which expressly exclude the States from exercising an authority over its subject matter. If they are excluded, it must be because the nature of the power, thus granted to congress, requires that a similar authority should not exist in the States. * * * Either absolutely to affirm or deny that the nature of this power requires exclusive legislation by congress, is to lose sight of the nature of the subjects of this power, and to assert concerning all of them, what is really applicable but to a part. Whatever subjects of this power are in their nature national, or admit only of one uniform system or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress."

In Ex. parte McNeil, 13 Wall. 236 (1871), the Court for the first time classified governmental powers as between state and national. In that case it was said:

"In the complex system of polity which prevails in this country the powers of government may be divided into four classes. Those which belong exclusively to the States. Those which belong exclusively to the national government. Those which may be exercised concurrently and independently by both. Those which may be exercised by the States, but only until Congress shall see fit to act upon the subject."

In case of the State Freight Tax, 15 Wall. 232 (1872), the Court said:

"The rule has been asserted with great clearness, that whenever the subjects over which a power to regulate commerce is asserted are in their nature national, or admit of one uniform system or plan of regulation, they may justly be said to be of such a nature as to require exclusive legislation by Congress. Surely transportation of passengers or merchandise through a State, or from one State to another, is of this nature. It is of national importance that over that subject there should be but one regulating power."

This decision seems to have placed the power in Congress to regulate commerce among the States, so far as concerns transportation of passengers and freight, squarely in the second class defined in Ex. Parte McNeil, *supra*, that is to say, among those which belong exclusively to Congress.

Again, in Welton v. Missouri, 91 U. S. 275 (1875) the Court said:

> "Commerce is a term of the largest import. It comprehends intercourse for the purposes of trade in any and all its forms, including the transportation, purchase, sale, and exchange of commodities between the citizens of our country and the citizens or subjects of other countries, and between the citizens of different States. The power to regulate it embraces all the instruments by which such commerce may be conducted. So far as some of these instruments are concerned, and some subjects which are local in their operation, it has been held that the States may provide regulations until Congress acts with reference to them; but where the subject to which the power applies is national in its character, or of such a nature as to admit of uniformity of regulation, the power is exclusive of all state authority.
>
> "It will not be denied that that portion of commerce with foreign countries and between the States which consists in the transportation and exchange of commodities is of national importance, and admits and requires uniformity of regulation. The very object of investing this power in the General Government was to insure this uniformity against discriminating state legislation."

However, in 1877 the Granger Cases, so-called, came before the Court. The case of Peik v. C. & N. W. Ry. Co., 94 U. S. 164, involved the validity of a statute of Wisconsin providing maximum rates for transportation of persons or property carried within the State, or taken up outside the State and carried within it, or taken up inside and carried without. The validity of the law was sustained on the ground that "Until Congress

acts in reference to the relations of this company to interstate commerce it is certainly within the power of Wisconsin to regulate its fares, etc., so far as they are of domestic concern"; but it is clear that the point that the statute encroached upon the exclusive power of Congress to regulate interstate commerce was urged only faintly.

In Wabash Ry. Co. v. Illinois, 118 U. S. 557 (1886), the Court says in respect of this fact:

> "It will be seen, from the opinions themselves, and from the arguments of counsel presented in the reports, that the question did not receive any very elaborate consideration, either in the opinions of the Court or in the arguments of counsel",

the question in the case being whether the State had the right to fix any traffic charges whatsoever, as to which question Munn v. Illinois, 94 U. S. 113, which was decided at the same time, was made the leading case.

In Wabash Ry. Co. v. Illinois, *supra*, a statute of Illinois similar in terms to that involved in Peik v. C. & N. W. Ry. Co. was before the Court. The Supreme Court of Illinois had held it valid on authority of Peik v. C. & N. W. Ry. Co. Upon writ of error to that court the point was urged vigorously to the United States Supreme Court that the statute of Illinois encroached upon the exclusive power of Congress to regulate commerce among the States. This Court in an exhaustive opinion through Mr. Justice Miller reversed the decision of the Illinois court, and, after a review of all the cases, declared that

> "it is not, and never has been, the deliberate opinion of a majority of this court that a statute of a State which attempts to regulate the fares and charges by railroad companies within its limits, for a transportation which constitutes a part of commerce among the States, is a valid law."

This seems to be the last word on the subject and by this decision any claim that the States may regulate interstate commerce whether or not Congress shall have exercised its power in that regard seems to have been foreclosed. To this point has come the development of the application of the law from the time when the power of Congress to regulate commerce was applied solely to commerce carried on by water traffic, for, as was said in R. R. Co. v. Maryland, 21 Wall. at p. 470,

> "no one then supposed that the wagons of the country, which were the vehicles of this commerce, (overland) or the horses by which they were drawn, were subject to national regulation",

through the days of canals and turnpikes to the days of great transcontinental systems of railroad traversing, as does the Northern Pacific, and as does the Great Northern, seven States with one continuous, straight-away line of track, and the very much larger portion of whose business is among the States.

We say development of the application of the law because there has been no change in the law itself but only in conditions which invoked its application. It was said by the Court in In re Debs, 158 U. S. 564 (1895):

> "Constitutional provisions do not change, but their operation extends to new matters as the modes of business and the habits of life of the people vary with each succeeding generation. The law of the common carrier is the same today as when transportation on land was by coach and wagon, and on water by canal boat and sailing vessel, yet in its actual operation it touches and regulates transportation by modes then unknown, the railroad train and the steamship. Just so is it with the grant to the national government of power over interstate commerce. The Constitution has not changed. The power is the same. But it operates today upon modes of interstate commerce

unknown to the fathers, and it will operate with equal force upon any new modes of such commerce which the future may develop."

Meantime, and before the decision in Wabash v. Illinois, *supra*, in County of Mobile v. Kimball, 102 U. S. 691 (1880), the Court in construing the Commerce Clause of the Constitution had said:

"The subjects, indeed, upon which Congress can act under this power are of infinite variety, requiring for their successful management different plans or modes of treatment. Some of them are national in their character, and admit and require uniformity of regulation, affecting alike all the States; others are local, or are mere aids to commerce, and can only be properly regulated by provisions adapted to their special circumstances and localities. Of the former class may be mentioned all that portion of commerce with foreign countries or between the States which consists in the transportation, purchase, sale, and exchange of commodities. Here there can of necessity be only one system or plan of regulations, and that Congress alone can prescribe. Its non-action in such cases with respect to any particular commodity or mode of transportation is a declaration of its purpose that the commerce in that commodity or by that means of transportation shall be free. There would otherwise be no security against conflicting regulations of different States, each discriminating in favor of its own products and citizens, and against the products and citizens of other States. And it is a matter of public history that the object of vesting in Congress the power to regulate commerce with foreign nations and among the States was to insure uniformity of regulation against conflicting and discriminating state legislation";

and in Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196 (1884), the Court had said:

"It needs no argument to show that the commerce with foreign nations and between the States, which consists in

> the transportation of persons and property between them, is a subject of national character, and requires uniformity of regulation. Congress alone, therefore, can deal with such transportation; its non-action is a declaration that it shall remain free from burdens imposed by state legislation."

In Stone v. Farmers' Loan & Trust Co. (Railroad Commission Cases), 116 U. S.. 307 (1885), it is said:

> "It is now settled in this court that a State has power to limit the amount of charges by railroad companies for the transportation of persons and property within its own jurisdiction, unless restrained by some contract in the charter, or unless what is done amounts to a regulation of foreign or interstate commerce,"

and further:

> "Legislation of this kind to be unconstitutional must be such as will necessarily amount to or operate as a regulation of business without the State as well as within."

It should be borne in mind that these declarations of the Court are of rules of construction of the Commerce Clause of the Constitution. They have not only not been qualified, but they have been followed in numerous cases down to the present day. For a quarter of a century they have stood as the supreme law of the land; and they are now considered and ought to be considered as immune from dignified attack. It seems, then, safe to lay down these principles of construction of the Commerce Clause of the Constitution as postulates—as bases of argument—existing at the time of the passage by Congress of its Act to Regulate Commerce, approved Feb. 4, 1887:

> (a) Congress has full and exclusive power to regulate commerce among the States.
>
> (b) This power is complete in itself, may be exercised to its utmost extent and acknowledges no limitations other than are prescribed in the Constitution.
>
> (c) Non-action by Congress in performance of this

power is tantamount to a declaration by it that commerce among the States shall be free and without trammels, excepting those imposed by the common law.

(d) The States have power to regulate commerce transacted wholly within their own limits, but only in such manner as will not necessarily amount to or operate as a regulation of foreign or interstate commerce.

(e) Action by a State which will necessarily amount to or operate as a regulation of interstate commerce is unconstitutional and void.

We submit that each one of these rules may be laid down as postulates and as veritable, actual premises for any argument to which it may be germane. In support of this proposition we cite, in addition to the cases above quoted from, the following:

(a) Asbell v. Kansas, 209 U. S. 251 (1907).
(b) Northern Securities Co. v. U. S., 193 U. S. at p. 335 (1903).
(c) Northern Securities Co. v. U. S., 193 U. S. at p. 371.
(d) Smyth v. Ames, 169 U. S. at p. 523 (1897).
(e) Asbell v. Kansas, 209 U. S. at p. 254 (1907).

In argument against our claim of the full integrity of rules (d) and (e) attention doubtless will be, as it has heretofore been, called to language of the Supreme Court such as that in the case of Atlantic Coast Line v. Nor. Car. Corp. Com'n, 206 U. S. at page 19, as follows:

> "The elementary proposition that railroads from the public nature of the business by them carried on and the interest which the public have in their operation are subject, as to their state business, to state regulation, which may be exerted either directly by the legislative authority or by administrative bodies endowed with power

> to that end, is not and could not be successfully questioned in view of the long line of authorities sustaining that doctrine,"

and the claim doubtless will be made, as it has heretofore been made, that the omission of the qualification "unless what is done amounts to a regulation of foreign or interstate commerce" utterly eliminates that qualification, and that the rule must now be considered as accurately and fully expressed without it. Nobody would get easily to the end of an argument if called upon invariably on account of a demand for precision in statement of a rule to append a recital of all possible conditions and variations of facts to which the rule might be held inapplicable. A large majority of rules has numerous exceptions, but it ought not fairly to be considered a matter of either intentional exclusion of the exceptions or of careless statement of the rule if no mention be made of the exceptions in stating the rule. And, if the argument that the failure to append the qualification based on the Commerce Clause of the Constitution eliminates the qualification from influence in the application of the rule is sound, manifestly a like argument is sound as to the omission of qualification based on the constitutional provision with regard to taking property without due process of law, of that with regard to the equal protection of the laws, and of that with regard to impairment of the obligation of contracts. In fact the argument, if not grotesque to start with, becomes so before it reaches its logically necessary development.

B.

Construction and effect of the Act to Regulate Commerce.

Soon after the decision in Wabash Co. v. Illinois was handed down the Congress passed the Interstate Commerce Act (approved Feb. 4, 1887). It was declared by the Court in Int. Com. Com'n v. B. & O. Rd. Co., 145 U. S. 263 (1891), that

> "The principal objects of the Interstate Commerce Act were to secure just and reasonable charges for transportation; to prohibit unjust discriminations in the rendition of like services under similar circumstances and conditions; to prevent undue or unreasonable preferences to persons, corporations or localities; to inhibit greater compensation for a shorter than for a longer distance over the same line; and to abolish combinations for the pooling of freights,"

and in Int. Com. Com'n v. Chicago G. W. Ry., 209 U. S. 108 (1907), that

> "Subject to the two leading prohibitions that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate so as to give undue preference or disadvantage to persons or traffic similarly circumstanced, the Act to regulate commerce leaves common carriers, as they were at the common law, free to make special rates looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce and of their own situation and relation to it, and generally to manage their important interests upon the same principles which are regarded as sound and adopted in other trades and pursuits."

That is to say manifestly that as to those matters covered by the Interstate Commerce Act, common carriers were thenceforth to be governed by the provisions of the Act, and as to all matters of interstate commerce not covered by the Act, they were to be untrammeled and uncontrolled, excepting by the rules of the common law. As to those matters of regulation of commerce among the States not covered by the Interstate Commerce Act or other enactments of Congress, the rule must still apply that the inaction of Congress is tantamount to a declaration by it that they shall be free and untrammeled. As to those matters, apparently, even though Congress has not exercised its power of regulation, the power is still exclusive and any action of a State which "will necessarily amount to or operate as a regulation" is unconstitutional and void.

Let us see in what attitude laws of a State must stand with regard to those matters of regulation of commerce as to which Congress has acted. In Gibbons v. Ogden, *supra*, through Mr. Chief Justice Marshall the Court said:

> "It has been contended that, if a law passed by a State, in the exercise of its acknowledged sovereignty, comes into conflict with a law passed by Congress in pursuance of the Constitution, they affect the subject, and each other, like equal opposing powers. But the framers of our Constitution foresaw this state of things, and provided for it by declaring the supremacy not only of itself, but of the laws made in pursuance of it. The nullity of any act, inconsistent with the Constitution, is produced by the declaration that the Constitution is the supreme law. The appropriate application of that part of the clause which confers the same supremacy on laws and treaties, is to such acts of the state legislatures as do not transcend their powers, but, though enacted in the execution of acknowledged state powers, interfere with, or are con-

trary to the laws of Congress, made in pursuance of the Constitution, or some treaty made under the authority of the United States. In every such case, the act of Congress, or the treaty, is supreme; and the law of the State, though enacted in the exercise of powers not controverted, must yield to it;"

and in Gulf Ry. Co. v. Hefley, 158 U. S. 98 (1895), the Court said:

"When a state statute and a federal statute operate upon the same subject matter, and prescribe different rules concerning it, and the federal statute is one within the competency of Congress to enact, the state statute must give way."

And, further:

"The question is not whether, in any particular case, operation may be given to both statutes, but whether their enforcement may expose a party to a conflict of duties. It is enough that the two statutes operating upon the same subject matter prescribe different rules. In such case one must yield, and that one is the state law."

In Northern Securities Co. v. U. S., *supra*, at p. 333 the Court said:

"An act of Congress constitutionally passed under its power to regulate commerce among the States and with foreign nations is binding upon all; as much so as if it were embodied, in terms, in the Constitution itself. Every judicial officer, whether of a national or a state court, is under the obligation of an oath so to regard a lawful enactment of Congress. Not even a State, still less one of its artificial creatures, can stand in the way of its enforcement. If it were otherwise, the Government and its laws might be prostrated at the feet of local authority. Cohens v. Virginia, 6 Wheat. 264, 385, 414. These views have been often expressed by this Court."

In Adams Express Co. v. Kentucky, 206 U. S. at p. 135 (1906), the Court said:

"In Vance v. Vandercook Company (No. 1), 170 U. S. 438, 444, Mr. Justice White, delivering the opinion of the Court, said:

'Equally well established is the proposition that the right to send liquors from one State into another, and the act of sending the same, is interstate commerce, the regulation whereof has been committed by the Constitution of the United States to Congress, and, hence, that a state law which denies such a right, or substantially interferes with or hampers the same, is in conflict with the Constitution of the United States.'"

Therefore, it appears to be safe to lay down another postulate which may equally be relied upon as secure against attack, as follows:

(f) An act of Congress passed in execution of its power to regulate commerce among the States is supreme; and any law of a State which substantially interferes with it or hampers its enforcement is void.

So far as concerns the argument of the question before us, it is obvious that rules (e) and (f) are of like application; and the only cases in which rule (f) is applicable, and in which rule (e) may not be, are those in which Congress, in execution of its power of regulation of commerce, has taken charge of subjects of the fourth class of powers enumerated in Ex. parte McNiel, *supra*, and brought them among the subjects of the second class by prescribing regulations for them. Indeed, the language of the Court in Vance v. Vandercook Co. quoted and approved in Adams Express Co. v. Kentucky, *supra*, was applied to Acts of the State which were not claimed to have interfered with express enactments of Congress, but only with matters within its exclusive power to regulate and as yet unregulated, and as to which its inaction is deemed a declaration that they shall be free from control. Moreover, inasmuch as it is the undisputed law that inaction by Congress in regulating interstate commerce is tantamount to a declaration on

its part that such commerce shall be free and without hindrance, the situation clearly would not be in the least changed if it should make an express enactment to that effect.

It seems, then, to be definitively clear that each law and order complained of, though made in the execution of acknowledged state power, is void if in its necessary operation and effect it substantially interferes with or hampers the enforcement of the Act to Regulate Commerce, or burdens or regulates interstate commerce, or substantially interferes with or hampers carriers in the enjoyment of those common law rights which Congress through its lack of regulation has declared shall be enjoyed freely, or places carriers in such position that they cannot obey the Act and enjoy their rights under it and at the same time obey the law or order.

We declare that we are able to demonstrate from the proved facts in the case, facts which are not substantially, if at all, controverted, that, under each of these counts, each law and order complained of is unconstitutional and void.

Before we begin the argument on the facts in the case it may be well to dispose of one contention which we have reason to believe will be made against us. The first section of the Act to Regulate Commerce contains a proviso as follows:

> "*Provided, however,* that the provisions of this Act shall not apply to the transportation of passengers or property or to the receiving, delivering, storage or handling of property wholly within one State and not shipped to or from a foreign country from or to any State or Territory as aforesaid."

It is apprehended that the claim will be urged that this proviso has the effect of yielding to the States the power to make rates for transportation wholly within their own territories free

from regard as to their effect on the enforceability of the Act, construed either in letter or in spirit; and free from regard as to their effect in forcing the carriers subject to them and to the Act either to disobey the principal provision of the Act forbidding discrimination or to fix their interstate rates touching Minnesota on a basis of parity with the Minnesota rates; and free from regard as to their effect in forcing such carriers either to fix interstate rates on the basis prescribed by the laws and orders respectively, or to abandon as a practical matter all interstate business touching Minnesota; and free from regard as to their effect in compelling the railroad companies to abandon their right free from control excepting under the Interstate Commerce Act (for there are apparently no common law rules of limitation applicable to them, excepting such as are incorporated in the Act) "to adjust and apportion their rates so as to meet the necessities of commerce and of their own situation and relation to it and generally to manage their important interests upon the same principles which are regarded as sound and adopted in other trades and pursuits." The bald statement of the argument defeats it. If the proviso is to be construed as yielding to the States the power to render the Act to Regulate Commerce unenforceable or to force carriers to adopt interstate rates on a basis of parity with state-made rates or to abandon interstate business, Congress has sought to yield to the States a most important part of the exclusive power to regulate commerce among the States given to it by the Constitution. It was said by the Court in Cooley v. Board of Port Wardens, 12 Howard at p. 318 (1851) that

> "If the Constitution excluded the States from making any law regulating commerce, certainly Congress cannot regrant or in any manner reconvey to the States that power."

And in Gunn v. Barry, 15 Wall, at p. 623 (1872) that

> "Congress cannot, by authorization or ratification, give the

slightest effect to a state law or constitution in conflict with the Constitution of the United States. That instrument is above and beyond the power of Congress and the States, and is alike obligatory upon both."

If Congress could not have itself pronounced that the proviso should be construed as yielding to the States the power to make rates in such manner as necessarily to regulate, limit or destroy interstate commerce, or to interfere with the exclusive power of Congress in that regard, manifestly no Court is at liberty to construe this proviso to the effect that such meaning was intended for it.

But it may be contended that, conceding the principal object to the Act to be

> "to secure equality of rates as to all and to destroy favoritism, these last being accomplished by requiring the publication of tariffs and by prohibiting secret departures from such tariffs, and forbidding rebates, preferences and all other forms of undue discrimination," New Haven R. R. v. Int. Com. Com'n., 200 U. S. 361 (1905),

and that it is the duty of the Interstate Commerce Commission under the Act to see

> "that no undue preferences are given to one place or places or individual or class of individuals, but in all things that equality of right, which is the great purpose of the Interstate Commerce Act, shall be secured to all shippers." Int. Com. Com'n. v. Cin. N. O. & Tex. Pac. Co., 167 U. S. 479 (1896)—

we say that, conceding the principles so declared to be sound, it may be contended that it was the intention of the proviso to forbid only such discrimination between persons or localities as resulted from interstate rates alone; and that if a State shall

see fit to make rates for transportation within its limits such as will result necessarily in compelling a carrier either to adopt the same basis of rates for its interstate business or to discriminate against localities in other States the law shall not apply and there shall be no redress under it. It is immediately patent that such a contention is without serious foundation—and for two particular reasons:

First. It ignores the basic cause of the abandonment of the Confederation and the adoption of the Constitution

(Passenger Cases, *supra*),

and the sole and only cause of the grant by the States to the Federal Government of the power to regulate commerce among the States.

Welton v. Missouri, *supra*.

Second. The Commerce Act provides (Section 3) not only that it shall be unlawful for any carrier to give any undue preference or advantage to any locality, but as well that it shall be unlawful for any carrier "to subject any particular * * * locality * * * to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." If a carrier should voluntarily put in rates between the Twin Cities and Moorhead, Minnesota, on the North Dakota border, so much less than those between the Twin Cities and Fargo, North Dakota, one mile distant from Moorhead, as to discriminate Fargo off the map, it would be mere effrontery to argue that the Interstate Commerce Commission could not entertain a complaint by Fargo based on such discrimination in the interstate rates, because the rates so put in to and from Moorhead were for intrastate transportation between it and the Twin Cities or Duluth, the principal consuming and producing markets for both Fargo and Moorhead, notwithstanding the fact that the rates complained of were discriminatory against a locality in another State. The forbidding in the Act of discrimination *against* any locality "in any

respect whatsoever" would resolve itself into a jest under such a holding.

But manifestly if such a discrimination would be within the power of the Commission to remedy if the carrier put in its rates voluntarily, it would be equally within its power to prevent if the carrier put in the rates under command of the State. The proviso does not cover alone state-made rates, but rates for transportation wholly within a State by whatsoever agency made. And if the discrimination could not be prevented under the Act, it could not be prevented at all—for certainly North Dakota could not prevent it, unless indeed by retaliation; and it would be wholly to the interest of Minnesota that the discrimination should continue.

It is a substantive principle of law that "the history of the times and the defect or mischief which the statute was intended to remedy." (Smith v. Townsend, 148 U. S. 490 [1892]) may be resorted to for the purpose of construing a statute; and that the purpose being recognized the statute should be given a construction broad enough to achieve the design of its makers. It was said of the Act to Regulate Commerce in New Haven R. R. Co. v. Int. Com. Com'n, *supra*, that

> "To this extent and for these purposes" (the securing equality of rates as to all, and the destroying of preferences and discriminations) "the statute was remedial and is, therefore, entitled to receive that interpretation which reasonably accomplishes that great public purpose which it was enacted to subserve."

It has been seen that the purpose of the Commerce Clause of the Constitution under the power contained in which the Act was passed was to prevent discrimination by States in their own favor and against other States. If one of the evils sought to be remedied was to prevent discrimination by one State in favor of a second State and against a third, history does not seem to disclose it. It may be that such an evil existed; but, in any event,

the great evil, so great as seriously to menace the peace of the country, was the practice of discrimination by States in their own favor and against other States. The necessity of eradicating this evil was the fundamental cause of the grant to Congress of the power to regulate commerce among the States. We contend, therefore, that the Act to Regulate Commerce should not receive a construction out of harmony with the design of the grant of the power in execution of which the Act was passed.

If this be true of the body of the Act, and it should be construed broadly enough to enable the Commission to prevent a discrimination against interstate rates in favor of state rates, what of the proviso? It is common learning that

> "A construction of a proviso to an Act which makes the proviso plainly repugnant to the body of the Act is inadmissible."

Dollar Savings Bank v. U. S., 19 Wall. 227.

And if we are correct in our position that an important, if not the most important, object of the body of the Act is to remedy discrimination against interstate rates in favor of state rates, then a construction of the proviso which makes such discrimination remediless is impossible; and if wholly necessary from the directness of the language employed, the proviso, like an exception in a deed which is repugnant to the grant, is void.

It is as common learning that

> "A proviso carves special exceptions only out of the enacting clause; and those who set up any such exception must establish it as being within the words as well as the reason thereof."

U. S. v. Dickson, 15 Peters 141.

We submit that one who in full contemplation of the causes leading up to the Interstate Commerce Act can find reasons for excepting from its application discrimination against an inter-

state locality in favor of a locality within a State must indulge in fantastic argument in support of them.

It is on these lines that the Court has construed the proviso in Sec. 22 that

> "Nothing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by statute but the provisions of this Act are in addition to such remedies."

Saying in Tex. & Pac. Ry. Co. v. Abilene Cotton Oil Co., 204 U. S. 426 (1906):

> "That the act to regulate commerce was intended to afford an effective means for redressing the wrongs resulting from unjust discrimination and undue preference is undoubted. Indeed, it is not open to controversy that to provide for these subjects was among the principal purposes of the Act. Interstate Commerce Commission v. Cincinnati, New Orleans & Texas Pacific Ry. Co., 167 U. S. 479, 494. And it is apparent that the means by which these great purposes were to be accomplished was the placing upon all carriers the positive duty to establish schedules of reasonable rates which should have a uniform application to all and which should not be departed from so long as the established schedule remained unaltered in the manner provided by law. Cincinnati, New Orleans & Texas Pacific Ry. Co. v. Interstate Commerce Commission, 162 U. S. 184; Interstate Commerce Commission v. Cincinnati, New Orleans & Texas Pacific Ry. Co., 167 U. S. 479.
>
> But it is insisted that, however cogent may be the views previously stated, they should not control, because of the following provision contained in Section 22 of the Act to regulate commerce, viz: '* * * Nothing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies.' This clause, however, cannot in reason be construed as continuing in shippers a common law right, the continued existence of

which would be absolutely inconsistent with the provisions of the Act."

Whatever meaning may be given the proviso it is manifest that if it be construed as granting to the States greater power than was left to them by the Commerce Clause of the Constitution, it is of no validity; if it be construed as surrendering any part of the power granted to Congress by the Commerce Clause of the Constitution it is likewise of no validity; if it be construed as a declaration by Congress that it does not by the Act provide for regulation of commerce local to the State, then the most that can be claimed for it is that it leaves such commerce, so far as regulation of it may affect interstate commerce, free and unregulated.

C.

If the defendant railway companies must obey the laws and orders complained of they must either surrender their rights under the Constitution of the United States and submit to regulation of their interstate rates by the State or disobey the principal mandate of the Act to Regulate Commerce—that forbidding unjust discrimination.

1. *As to the Order of Sept. 6, 1906, and the necessity for the extension of the rates prescribed by it to interstate traffic over the same lines of road.*

Moorhead, Minnesota, is on the main line of the Northern Pacific Railway, 239 miles westerly of Minneapolis, and is on the extreme westerly border of the State. It is of sufficient commercial importance to have justified the Railroad Commission in its Order of May 3, 1907, in designating it as a distributing centre and giving it special "mixed carload" rates as such (Ex. 2 to Bill of Complaint N. P. case). Fargo, North Dakota, is on the same main line of the railway at an official distance of one mile westerly of Moorhead and on the extreme easterly border of its State. The cities are separated only by the Red River, which is only a few hundred feet wide. They are substantially one town (Baird N. P. p. 1456). They have always had the same rates in and out (ibid., p. 1458). Their principal shipments are the same and to the same markets, and their principal receipts are the same and from the same markets, the markets in both cases being Duluth, Superior, Minneapolis and St.

Paul. They have no other available consuming or producing markets. (Ibid., pp. 1457-8). No conditions exist which justify considering them other than as one town (ibid., p. 1458).

East Grand Forks, Minn., 319 miles westerly of Minneapolis, and Grand Forks, N. D., and Breckenridge, Minn., 227 miles westerly of Minneapolis, and Wahpeton, N. D., are situated on other lines of the N. P. railway in exactly the same relation as respects the members of each pair as Fargo and Moorhead, and subject to precisely the same conditions (ibid., 1456). Duluth, Minn., is situated on the easterly border of the State, side by side with Superior, Wis., which is on the westerly border of its State. Their conditions are the same and their receipts and shipments of like character (p. 1474).

St. Paul and Minneapolis have always been treated as one city, as they adjoin and have industries located between their centres, so that it would be impossible to make any distinction between them as to rates. For the same reason, Duluth and Superior have always been treated as a common point. (Ibid., pp. 1461-2, 1474.)

The business in the North Dakota border cities, Wahpeton, Fargo, and Grand Forks, has been built up on a basis of a parity of rates with Breckenridge, Moorhead and East Grand Forks, their respective neighbors in Minnesota; and any change in that relation would work an unjust discrimination (ibid., p 1463).

If rates were different at Duluth and Superior, the one having the higher rate would be entirely out of business (Defendant Staples, p. 2790).

If rates were substantially higher at Fargo than at Moorhead, the Fargo merchants would suffer (Staples, p. 2646 N. P.).

Exhibit 41 Baird (introduced at p. 1460 N. P.) is a statement showing the rates on all classes of merchandise covered by the Commission's Order of Sept. 6, 1906, prior to the taking effect of the Order, from St. Paul, Minneapolis, Duluth and Superior,

on the east, to Breckenridge, Minn. and Wahpeton, N. D., to East Grand Forks, Minn., and Grand Forks, N. D., and to Moorhead, Minn., and Fargo, N. D., on the west. It shows that the rates from each of the eastern cities to each member of the respective pairs of the western cities were the same, and whether the transportation covered was interstate traffic from Superior to either of the western cities, whether in Minnesota or North Dakota, or from any other of the eastern cities to any of the North Dakota cities, or was state traffic from St. Paul, Minneapolis or Duluth on the east, to one of the Minnesota cities on the west. Contrasted with these respective former rates, the statement shows the rates between St. Paul, Minneapolis and Duluth on the east, and Breckenridge, East Grand Forks and Moorhead on the west, as prescribed by the Commission's Order of Sept. 6, 1906, and now in effect; and that the rates from Superior to the western Minnesota cities are the same as those from Duluth; that the present rates from St. Paul and Minneapolis to Wahpeton, Fargo, and Grand Forks are the same as those from those cities to Breckenridge, Moorhead, and East Grand Forks, respectively; and that the rates from Superior to those North Dakota cities are the same as from Duluth to corresponding Minnesota cities. The disparity between the former rates and those now in force is great. The present rates are from 20% to 25% lower than the corresponding rates in effect prior to the Order of Sept. 6, 1906. (Staples, p. 2752, N. P.) For example the former rate on 100 lbs. of 1st class merchandise from St. Paul and Minneapolis to Breckenridge or Wahpeton was 61 cents; the Commission's Order prescribed 51 cents from Minneapolis to Breckenridge, and that is the present rate from St. Paul and Minneapolis to Breckenridge or Wahpeton. The former rate was 19% greater than the present rate. The former rate on 100 lbs. of 2nd class merchandise from Duluth and Superior to Moorhead or Fargo was 57 cents; the present rate from Duluth to Moorhead as prescribed by the Order and

in effect also from Duluth to Fargo, and from Superior to Moorhead and Fargo, is 46 cents. The former rate was 24% greater than the present rate.

On the same day that the railway company put into effect the rates for transportation within the State, prescribed by the Order of Sept. 6, 1906, it put into effect interstate rates from Superior equal to the local rates from Duluth, and interstate rates from Duluth to Wahpeton, Fargo, and Grand Forks, equal to the local rates from Duluth to Breckenridge, Moorhead, and East Grand Forks, respectively, as well as interstate rates from Superior to Wahpeton, Fargo, and Grand Forks, equal to the local rates from Duluth to Breckenridge, Moorhead, and East Grand Forks, respectively. But why should it have done so, and what would have been its plight if it had not done so?

Moorhead is 255 miles from Duluth; Fargo is one mile farther. Breckenridge is 227 miles from Minneapolis; Wahpeton is one mile farther. Maintaining a rate from Duluth to Fargo increased by 24% over the rate from Duluth to Moorhead for an added haul of one mile to 255 miles, and maintaining a rate from Minneapolis to Wahpeton increased by 19% over the rate from Minneapolis to Breckenridge for an added haul of one mile to 227 miles for merchandise hauled under the same conditions in the same train and probably in the same car (Elliott, p. 1223-4, N. P.; Maguire, p. 797, G. N.; Staples, p. 2692, N. P.) would in each case have furnished a glaring example of unjust discrimination against the locality in North Dakota. (Staples, p. 2894-5, N. P.) Likewise, maintaining an interstate rate from Superior to Moorhead or from Superior to Fargo increased by 24% over the rate from Duluth to Moorhead would be a palpable example of unjust discrimination against the interstate localities. It needs no opinions of experts nor argument of principle to demonstrate that proposition. It demonstrates itself. Maintaining the former interstate rates, therefore, contemporaneously with the existence of the Commission's rates for

transportation within the State would have involved a necessary and direct offence against the provision of the Act to Regulate Commerce, enacted by Congress in execution of its power under the Commerce Clause of the Constitution, and therefore, the supreme law of the land, that

> "It shall be unlawful for any common carrier subject to the provisions of this Act * * * to subject any particular * * * locality to any undue or unreasonable prejudice or disadvantage whatsoever.

It has been intimated by our opponents sometimes during the progress of these suits that the railroad company was not compelled by law to reduce its interstate rates—even those most closely affected by the prescribed state rates; that the state regulation applied only to rates for transportation wholly within the State; that the State could not regulate interstate rates and that the reduction by the carrier in its interstate rates was its voluntary act of which it cannot complain.

The Act to Regulate Commerce prescribes the method adopted by Congress for regulating commerce among the States, so far as Congress wishes that it shall be regulated. It provides (Sec. 6):

> "That every common carrier subject to the provisions of this Act shall file with the Commission created by this Act, and print and keep open to public inspection schedules showing all the rates, fares and charges for transportation,"

over its lines. And that (ibid.) no carrier shall

> "Charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property or for any service in connection therewith between the points named in such tariffs, than the

rates, fares and charges which are specified in the tariff filed and in effect at the time."

When carriers have made, filed and published their schedules of rates, as provided in the Act, the rates recited in the schedules are made in accordance with the regulations of Congress to that end. The rates so made are Congress-made rates —made in accordance with the Act of Congress in execution of its constitutional power in that regard. When rates are made by the carrier under the provisions of the Act the carrier not only may enjoy them but, as well, must enjoy them, and no lower or higher rates, until the rates as established are changed in a manner provided by the terms of the Act. No action of a State may interfere with the maintenance of rates so made, nor may anybody else interfere excepting in the manner provided by the Act; and any action of a State which does necessarily or directly so interfere or which hampers or interferes with the enjoyment by the carrier of rates so made, is void. We think that we need not here cite again authorities in support of this proposition.

It is clear, therefore, that the State of Minnesota could not lawfully compel the railway company to reduce its interstate rates to a basis on a parity with the state-made rates. But if the company had not reduced its interstate rates, and had maintained them as they existed prior to the taking effect of the Order, the result, after the installing of state rates as prescribed by the Order, would have been a violation of the provision of the Act to Regulate Commerce forbidding discrimination. So, therefore, although the State concededly could not compel the carrier to reduce its interstate rates because it could not regulate interstate commerce, the necessary and direct effect of the installation and maintenance of the rates fixed by the State was to compel the carrier either to reduce its interstate rates or to violate a law of Congress. All that was left to the volition of the railroad company was the choice between dis-

obeying the Act to Regulate Commerce and disobeying the Order, unless it should take refuge, as it did, in surrendering its rights under the Constitution and permitting the State to control its interstate rates. It is of that surrender that complainants find fault.

But is there any other power that could compel the railway company to reduce its interstate rates to a basis on a parity with the state-made rates?

In the Matter of Freight Rates, XI Int. Com. Rep. 209, was a friendly proceeding before the Commission in which it entertained the complaint of business interests of Memphis that the defendant railway company was discriminating in favor of Little Rock and Pine Bluff and against Memphis. As is readily discernible from an examination of the case as reported, the predicament of the Commission was this: The rates between Little Rock and Pine Bluff on the one hand and Arkansas points on the other had been prescribed by the Arkansas Commission. The railway company thought that they were too low and protested against them on that ground, but put them in. It did not reduce its interstate rates between Memphis and Arkansas points to a basis bearing a proper relation to the Commission-made rates between Little Rock and Pine Bluff and Arkansas points and the discrimination against Memphis did in fact and concededly exist. The Commission did not consider the higher basis maintained by the railroad for its interstate business unreasonable unless by comparison with the low schedule prescribed by the State Commission; that is to say, it did not consider the interstate rates between Memphis and points in Arkansas unjust or unreasonable under the provisions of Sec. 1 of the Act to Regulate Commerce. It could not order the railway company to put in unjustly or unreasonably low interstate rates; it could not violate the provisions of one section of the Constitution in order to perform its functions under another. It felt that it had no power to order the railway company to raise

its state schedule to a parity of relation with the interstate schedule. Therefore, it confessed itself powerless to aid Memphis in its complaint that, situated in Tennessee, it was by laws of Arkansas being discriminated against in favor of localities in Arkansas.

In its decision the Commission said:

> "It will thus be seen that the relative rates of which Memphis complains, if we except the jobbers' tariffs above mentioned, were not voluntarily established by defendant. It was not the free and uncontrolled action of the carrier which brought about the alleged discrimination but the exercise of authority by the Arkansas Commission. The defendant in nowise acquiesced in the reduction ordered by that Commission but on the contrary manifested its opposition by repeated protests. Short of entering upon a course of litigation with the State of Arkansas the defendant appears to have done about all it could to show its objection to the rates imposed; and has even gone to the extent of printing a protest upon the face of its tariffs.
>
> *"So far as the discrimination of which Memphis complains was caused by the action of the Arkansas Commission, without the consent and against the protest of defendant, it is certainly doubtful in the present state of the law whether the defendant can be held responsible."*

Can there be a better example of state laws which operate directly and necessarily to prostrate the Government and its laws "at the feet of local authority?" Northern Securities Co. v. U. S., *supra*. Can there be a more forcible illustration for our proposition that the enforcement of the Order "substantially hampers" the enforcement of the law of Congress?

The Commission seems to indicate that if the railway company had voluntarily established the local schedule it would have been guilty of discrimination under the Act to Regulate

Commerce, and a remedy might have been afforded; but the discrimination was not the act of the railroad but that of the State; and a State may by its regulations discriminate in favor of its own citizens against those of other States freely and without hindrance. In its decision the Commission appears either to have lost sight of some of the principles of law which we have hereinabove laid down as postulates or, what is probable, felt itself unable to stand upon them and declare unconstitutional and inoperative laws of a State which, if enforced would not only interfere with but prevent utterly the performance by the Commission of its duty as the accredited agency of the national government.

Therefore, we agree that the railroad company was not lawfully compelled to reduce its interstate rates on account of the action of the State in seeking to prescribe a lower basis of state rates. If we did not agree to that we ought not to be in court seeking to compel it to discontinue or to refuse, as the case may be, obedience to the Laws and Orders, obedience to which has compelled or will compel it to reduce its interstate rates. Our contention is that it should not have obeyed and ought not to obey the Laws and Orders prescribing rates within the State because obedience to them necessarily and directly involves either a reduction in its interstate rates or disobedience to the Act to Regulate Commerce. Our contention is that if the railroad company had of its own volition maintained such unequal rates as the formerly existing interstate rates and the local Commission-made rates it would have been guilty of an offence against the Interstate Commerce Act; and that its condition was not changed merely because of the Order of the Commission since the Order gave it and could give it no greater justification for violating the supreme law of the land than it would have had without it.

But doubtless it will be urged that the power of the carriers to make and maintain their rates for interstate transportation is qualified by the proviso that such rates shall be just and reasonable; and that if this Court shall find that the Commission-made rates to Moorhead, East Grand Forks and Breckenridge, respectively, are just and reasonable, it must find that the former interstate rates, which were on a much higher basis, to Fargo, Grand Forks and Wahpeton, respectively were unreasonable; that the company had no right to establish them, and cannot complain if it cannot maintain them. It is a sufficient answer to this that this Court has no power to find the interstate rates unreasonable, nor to base any ruling upon a conclusion that they are unreasonable. In the first instance, the question of the reasonableness of established interstate rates is for the Interstate Commerce Commission alone, and it cannot be determined by any Court.

Tex. & Pac. Ry. v. Abilene Cotton Oil Co., 204 U. S. 426 (1906).

Again when rates have been established under the provisions of the Act to Regulate Commerce, they are not only *prima facie* reasonable but it is a violation of law for a railroad company to charge either more or less than the schedule rates until they shall have been changed by the company of its own volition in the manner provided by the Act or by the Commission in a proceeding provided by the Act.

Nor can the declaration by the Commission in its Order of Sept. 6, 1906, that the maximum rates by it prescribed are reasonable have any weight, even though it be admitted that rates lawfully prescribed by a State for transportation within its limits are *prima facie* reasonable. We are talking about the reasonableness of interstate rates. The proposition that the

declaration of the State that a rate prescribed by it to Moorhead has weight to determine the reasonableness of a rate to Fargo begs the entire question. It is founded on this false syllogism. All rates to Moorhead and to Fargo must be the same. The State has power to prescribe rates to Moorhead which when prescribed are *prima facie* reasonable. Therefore the same rates must be *prima facie* reasonable to Fargo. What renders the syllogism false is the unsoundness of the minor premise. The State has not absolute and unqualified power to prescribe rates to Moorhead but only to prescribe such rates as will not necessarily and directly control the rates to Fargo, for by such control of rates to Fargo the State trespasses upon the exclusive domain of Congress, and its action is void. The falseness of the syllogism may be demonstrated by this true syllogism: All rates to Moorhead and to Fargo must be the same. The federal government has power to prescribe rates to Fargo which, when prescribed, are *prima facie* reasonable. Therefore the same rates must be reasonable to Moorhead. The difference in the syllogisms is in the minor premise only; and the test as to which is true and which is false lies in the application of the rule that when federal and state powers are exercised on the same subject matter, the federal power is supreme and the state power must give way.

If it be fully conceded that the State has power to regulate rates between Moorhead and points within Minnesota; that rates to Fargo and Moorhead must be the same; and that the federal authorities have power to regulate rates between Fargo and points in Minnesota; then manifestly whichever power regulates rates between points in Minnesota and either Fargo or Moorhead regulates rates between points in Minnesota and both Fargo and Moorhead. It presents a case of a federal law and a state law acting on the same subject matter, and the federal law prevails, and the state law is void.

Again, it may be urged that the privilege given to carriers by the Act to Regulate Commerce to prescribe their own rates is subject to the mandate of the Act that they shall not discriminate, and that that qualification applies to the case under discussion; that if the rates made by the company for interstate traffic are such as necessarily work a discrimination against an interstate locality in favor of a state locality, the rates for which are prescribed by the State, the interstate rates are made in violation of law, and were void *ab initio*, if made while the state-made rates were in effect, or were invalidated automatically upon the subsequent taking effect of the state-made rates. This argument, when logically pursued, brings us to the same point as has been heretofore sufficiently safeguarded. The conclusion must be that the Act to Regulate Commerce gives to the carriers power only to make their tariffs covering transportation among the States in harmony with state tariffs covering transportation within the States; that interstate tariffs shall be made in subordination to state tariffs; that state-made tariffs shall control interstate tariffs; that the power of Congress to regulate commerce among the States shall be dependent on the action of the States; that the proper construction of the Act to Regulate Commerce makes it tantamount to an amendment of the Commerce Clause of the Constitution, which grants to Congress full and exclusive power to regulate commerce among the States free from interference by any State.

We suspect that it may present itself to the mind of somebody that this condition of affairs with regard to Fargo and the other North Dakota cities mentioned, although its necessary existence as a result of the Order of Sept. 6th is not to be denied, is of small importance; and when urged as a ground for declaring the Order unconstitutional as an interference with regulation of interstate commerce is of mere trivial importance. Let us

see how far this condition of affairs extends, and what its importance really is. An epitome of the facts as to the situation of the Northern Pacific Railway Company, and the embarrassment in its interstate rates caused by the state schedule, is set forth in the testimony of Mr. Baird, General Freight Agent of the N. P. Ry. Co., at pp. 1467 *et seq.* N. P. Record. It discloses the following:

Moorhead, Fargo, Bismarck, Billings, Butte, and Spokane are all centres from which jobbing is done to a considerable extent. The merchants at these points endeavor within certain limits to compete with merchants in St. Paul, Minneapolis, and Duluth, and with each other in common territory. One of the greatest difficulties confronting the traffic department arises from the contentions of such jobbing centres for rates that will enable them to distribute goods to the greatest advantage. The schedule of rates in effect prior to the taking effect of the Commission's Order reasonably met these conflicting claims and permitted the merchants in the different communities to distribute their goods in territory that was common on substantially an equal footing. This schedule had been in existence for many years and under it these various communities had built up quite a large distributing trade. (Baird p. 1525 N. P.) Any reduction in rates to one of these points, e. g., Fargo, gives an advantage to Fargo over the Twin Cities and Duluth in all the territory geographically tributary to Fargo unless the interstate rates into that territory from the Twin Cities and Duluth are correspondingly reduced and an advantage over Bismarck in territory common to Fargo and Bismarck unless rates to Bismarck are correspondingly reduced. If rates to Bismarck are reduced Bismarck will be given an advantage over the Twin Cities and Duluth in territory tributary to Bismarck unless rates into that territory from the Twin Cities and Duluth are correspondingly reduced and an advantage over Billings in ter-

ritory common to Billings and Bismarck unless rates to Billings are correspondingly reduced. And so the trouble progresses all over the system.

At the time that the Commission's rates to Moorhead were put in, merchandise rates from Twin Cities and the Head of the Lakes were reduced as far west as Bismarck. (Baird, p. 1464, N. P.) The rates from Superior to these North Dakota points were reduced to the same level and at the same time as those from Duluth (ibid., p. 1475).

Exhibit 47 Baird is a tariff sheet showing interstate rates in force on the Northern Pacific prior to the Commission's Order, from Superior, Wis., and eastern Minnesota terminals to 225 stations in North Dakota, as compared to present rates between the same points. It shows a general and substantial reduction as far west as Bismarck, 445 miles westerly of St. Paul, and on some classes as far west as Beach, which is on the North Dakota-Montana border, 625 miles westerly of St. Paul.

The reductions were only to the extent necessary to bring the interstate rates down to no more than the sum of the locals into and out of Moorhead (ibid., p. 1523) and discrimination against rates from the Head of the Lakes and the Twin Cities to the North Dakota points still exists.

The nature of this discrimination is to be discerned from an examination of Exhibit 48 Baird. It shows certain combination car-load rates from St. Paul to Fargo (Fargo taking the Moorhead rates as prescribed by the Commission) plus less-than-car-load rates from Fargo to certain specimen points in North Dakota, as compared with less-than-car-load rates from St. Paul to the same specimen points. The combination of car-load rates from St. Paul to Fargo and less-than-car-load rates from Fargo to the points of destination is, in general, substantially lower than the less-than-car-load rates from St. Paul to the same points of destination. For example, on "beans dry

in sacks" the combination of car-load rate to Fargo (the Commission's rate to Moorhead) and the less-than-car-load rate from Fargo to Beach, N. D., 615 miles westerly of the Twin Cities, is 83.7 cents per cwt.; while the present interstate less-than-car-load rate from the Twin Cities to Beach is 98 cents. The Fargo merchant, therefore, under the present adjustment has an advantage over the Twin Cities merchants of 14.3 cents per cwt. in distribution of "beans dry in sacks" into Beach. This advantage has grown out of the reduction to Moorhead (and therefore necessarily to Fargo) under the Order and the failure of the Northern Pacific so far to reduce the interstate less-than-car-load rates from Twin Cities to points in North Dakota to such extent as is necessary to restore the relation of rates that existed prior to the Order as between the Twin Cities and Fargo on the one hand and points in North Dakota on the other hand, and that allowed fair competition between them as distributors. It is Mr. Baird's opinion (p. 1540-1, N. P.) that the Northern Pacific is under the necessity of readjusting the interstate rates from the Twin Cities to points in North Dakota because the present adjustment is unequal and unfair, in that it gives Fargo an advantage as a distributing center over the Twin Cities, which it did not enjoy until the Order was promulgated and took effect; and, (p. 1467), that if the merchandise rates are kept in force and the commodity rates prescribed by Chap. 232 are put in force the necessary result will be a lowering of rates all over the system because it is not possible to continue an unfair or discriminatory basis. (See also testimony of Mr. Elliott, p. 1384-5, N. P. Record.)

Prior to the Order rates in Wisconsin, Minnesota and North Dakota had been on an equal basis without regard to State lines, whether for local or interstate business (ibid., p. 1439, 1514); now the distance tariff in North Dakota is 25% higher than that in effect in Minnesota under the Order (ibid., p. 1527).

Communities in North Dakota are not satisfied with the present adjustment (ibid., p. 1464) and are pressing for further reductions to bring their rates on a parity with those in Minnesota (ibid., p. 1507; Elliott, p. 1384).

The testimony of Mr. Maguire, Assistant General Freight Agent of the Great Northern Company, is to the same effect in the Great Northern case. Prior to the Order the rates in Minnesota, North Dakota, and South Dakota were on the same basis and whether for local or interstate transportation (p. 794, G. N.). Conditions in Minnesota and in North Dakota are the same so far as concerns rate-making (p. 832) and the rates in one State are largely dependent on those in the other. A schedule into North Dakota extended on a higher basis than exists in Minnesota is unfair and cannot stand (pp. 802, 841).

At the same time that the merchandise rates prescribed by the Order were adopted, rates to practically all stations in North Dakota from the Twin Cities were reduced and further reductions must be made (ibid., p. 798). The sum of the locals to and out of Grand Forks is in some cases less than the through rates to North Dakota points, and this condition cannot long exist (ibid., p. 799; Elliott, p. 1404, N. P.; Baird, p. 1524, N. P.).

It seems that there is no advantage resting upon further citations of the testimony on this point. It is adequate in kind and the records in the cases teem with it. It all goes to the proposition that a lower basis of rates on traffic local to Minnesota than that which exists on traffic interstate between Minnesota and North Dakota is unfairly discriminatory against North Dakota. It goes beyond unfairness to border towns; it covers the entire State. And as it covers the entire State of North Dakota then, if the evil of discrimination against that State in favor of Minnesota be removed by reducing the interstate rates between Minnesota and North Dakota to a parity with those

local to Minnesota, unfair discrimination against Montana will result unless the basis of rates on traffic interstate between Minnesota and that State be correspondingly lowered.

The North Dakota border cities, therefore, have in this argument been used merely as most glaring examples to demonstrate the fact of the necessary discrimination which would have resulted from the operation of the Order if the Order had not resulted in the only alternative—necessarily and directly regulating the interstate rates to those border towns. They were used as examples merely because the fact of discrimination was so clearly and immediately apparent. It seems now to be as apparent that unless the Order shall necessarily and directly operate to regulate interstate rates from Minnesota points to all points in North Dakota and beyond discrimination will as necessarily result against those points and each of them in the same manner and to an extent as undue and unjust as against the North Dakota border cities.

Furthermore, with regard to distributing rates out of these minor jobbing centres as well as out of the eastern terminals of the railroad, Moorhead has distributing rates into Minnesota accorded it by the Commission. Fargo must have the same rates interstate into Minnesota or be discriminated against in favor of Moorhead. Conditions surrounding transportation are the same in North Dakota as in Minnesota. The mere question as to whether the line between the States is crossed by traffic does not cut a figure in the cost of conducting the traffic or in the reasonable compensation to be charged for it. So, unless interstate traffic is to be discriminated against and because other conditions are the same, Moorhead must have the same distributing rates in its westward interstate business into North Dakota as it has in its eastward local business into Minnesota. If it has, then Fargo must have the like distributing rates into local North Dakota points as Moorhead has. If Fargo has distributing rates on a parity with Moorhead's which

are regulated by the Minnesota Commission, Bismarck must have like distributing rates or be discriminated against in favor of Fargo. Billings must have like distributing rates or be discriminated against in favor of Bismarck—and so on. It seems, then, that, inasmuch as Minnesota and North Dakota have always heretofore had a like basis of local rates, any change in that basis in favor of one State will result in discrimination against the other.

But, it may be said, let each State take care of itself. Let North Dakota, if it would have no higher rates than Minnesota, and Montana; if it would preserve the relation between its rates and those of North Dakota, reduce the rates in their respective territories. But what of commerce among the States and the power of Congress in that regard? It appears clearly enough that as a practical matter of the operation of a railroad apart from the matter of unlawful discrimination the through rate cannot exceed the sum of the locals (Elliott, p. 1385, N. P.; Baird, p. 1478, N. P.; Maguire, p. 799, G. N.).

In that event the maximum of the interstate rates is safely fixed by the sum of the State rates, and the power of Congress is so far subordinate to the power of the States. To be sure, Mr. Staples is apparently of the opinion that the sum of the state locals would not necessarily govern as to freight transportation although as to passenger transportation he is confident that it would (Staples, p. 2896, N. P.). His distinction between the transportation of passengers and freight as to this matter is apparently based, not on any reasoning that a charge of a larger sum for a haul including only two terminal expenses than for the two hauls covering the same distance and including four terminal expenses is discriminatory on its face, but on the lack of facilities of a shipper of freight to trans-ship as compared with a passenger (Ibid., p. 2896).

But as between Minnesota and North Dakota the matter would be simplified. It is conceded that in order that plain unjust discrimination may be avoided Fargo and Moorhead must take the same rate. Each may avail itself, in transportation interstate between Minnesota and North Dakota, of the local rates without regard to interstate rates. Either may be availed of for transforming a shipment from one State destined for a point in the other from an interstate transaction into two local transactions so that the shipment may be made on two contracts consideration for which shall be equal only to the sum of the state locals. And if the plan attributed to the respective Commissions of Texas and Oklahoma be adopted—that a trans-shipping station shall be established on the border line between the two States—nobody need fear the necessity of resorting to interstate transportation and all charges will be regulated by the States. A carrier running across their border line need not heed Congressional regulation of commerce among the States because it will have none.

But it may be asked what objection is there to States making rates for transportation within their own territories even though the result be to limit interstate rates between them to the sum of the locals provided such rates be reasonable in and of themselves? That is to say, What objection is there as a practical matter leaving out of consideration the objection that it violates the Constitution by encroaching on the exclusive domain of Congress under the Commerce Clause?

In the first place, no one can fairly contend that the sum of two locals based only on a state boundary line can constitute a fair rate for a haul across that line. Every rate comprehends not only the hauling expense but as well two terminal expenses, the initial and the final. Each terminal expense contemplates an average of three days' use of a car in loading or unloading, as the case may be, besides switching and other expenses so

numerous in kind that they need not be specified here. (Hill, p. 1307, G. N.; Baird, p. 1530, N. P.)

The schedule prescribed in the Order of the Commission recognises this factor and allows 11.02 cents per cwt. of 1st. class merchandise and a fixed percentage of that sum for the other classes for terminal charges whatever the length of the haul. The sum of state locals based on only a boundary line would include four terminal charges when only two would be incurred by the carrier and would without question be demonstrably discriminatory in fact.

Moreover, application of the principle of making the through rate equal to the sum of the state locals would bring this result:

The rate on 1st class merchandise as prescribed by the Commission from Minneapolis to Fargo (taking the same rate as Moorhead) is 54.1 cents per cwt. Casselton is 20 miles beyond Fargo. If North Dakota should adopt the Minnesota Commission's schedule the sum of the locals from Minneapolis to Casselton would be 69 cents as compared with 71 cents, the rate in force prior to the Order, and 60 cents, the rate established at the time of taking effect of the Order. This rate—involving an added charge of 14.9 cents for a haul of 20 miles—would work such discrimination against Casselton and in favor of Fargo that it could not stand against complaint. (See Ex. 47, Baird, N. P.) Beach, N. D., is 385 miles westerly of Fargo. The sum of the locals to Beach would be 122 cents as compared with the existing rate of 140 cents. This rate involving an added charge of 67.9 cents for an added haul beyond Fargo of 385 miles as compared with the added charge of 14.9 cents in the Casselton rate for an added haul of only 20 miles would also discriminate unjustly against Casselton. These examples lend color to the statements of Mr. Baird (p. 1523, N. P.) and Mr. Maguire (p. 799, G. N.) that although reductions in interstate rates into North Dakota have been made out of deference to the sum of the

locals only, the reductions are not sufficient and the present relation is unfair and cannot endure.

Again, Ex. 35 Baird shows the sum of the locals over Moorhead (or Fargo, taking the same rate) for distances of 100 miles composed of 90 miles in Minnesota and 10 miles in North Dakota, 80 miles in Minnesota, and 20 miles in North Dakota, and so progressively to 10 miles in Minnesota and 90 miles in North Dakota. The present interstate rate for the distance is 43 cents per cwt. of 1st class merchandise. The sum of the locals, figured on the Commission's schedule for the Minnesota distance and on the present interstate and North Dakota distance tariff of the company for North Dakota distance, varies from 40.1 cents to 54.6 cents per cwt. on westerly-bound transportation, and from 38.7 cents to 54 cents per cwt. on easterly-bound transportation, according to the mileage in Minnesota.

Figured on any basis, the use of the state locals for an interstate rate can result only in universal discrimination.

It is therefore apparent that the "sum of the locals" shibboleth has no merit to support it. It cannot possibly work as a practical, let alone a constitutionally allowable, expedient. If the national power could and should be laid aside the States could not in any conceivable manner successfully regulate interstate rates, unless by absolute and utter disregard of the moral and practical proposition, whether or not forbidden by the common law, that common carriers shall not discriminate unjustly.

The Great Northern and the Northern Pacific, in a spirit of self-preservation, have reduced their interstate rates into North Dakota from their eastern terminals in Minnesota and Wisconsin to such an extent as, in the main, will not leave their through interstate rates larger than the sum of the locals based on the border line between the State of Minnesota and North Dakota. In so doing they have resigned so far their right

"to adjust and apportion their rates so as to meet the necessities of commerce and generally to manage their important interests upon the same principles which are regarded as sound and adopted in other trades and pursuits."

Cin. N. O. & Tex. Ry. Co. v. Int Com. Comn., 162 U. S. 184, repeated in Int. Com. Comn. v. C. N. O. & T. Ry. Co., 167 U. S. 479, and in So. Pac. Co. v. Int. Com. Comn., 200 U. S. 536.

They admit that they are now discriminating against all points westerly of the Minnesota-North Dakota border cities. They declare that they cannot in justice to localities beyond the State of Minnesota and to themselves—and their duties and benefits are of course in full harmony—maintain any basis of rates beyond the state line which shall be out of step with those within the State. This seems to their traffic men to be true as a practical operating matter. It commends itself to us as being forced by considerations of law. No better proof of the actual discrimination now existing is needed than the information contained in Exhibit 46—Baird. It shows the present interstate rates on merchandise covered by the Order maintained by the Northern Pacific from its eastern terminals to a number of principal stations westerly of Minnesota beginning with Dickinson, N. D., 550 miles westerly of St. Paul and including Spokane, Wash., 1,510 miles westerly of St. Paul. It shows the proportion of such rates attributable to Minnesota on a basis of proportion of mileage in Minnesota to that of the entire haul. Ten principal localities are shown in the exhibit and the present interstate rates for each of the ten classes to each locality. In almost all cases the proportion of the interstate rates attributable to Minnesota and figured on the proportion which the mileage in Minnesota included in the haul bears to the entire mileage of the haul is greater than the rate allowed as a maximum for the distance in Minnesota under the Order of the Commission. That is to say, the Northern Pacific under its interstate long haul rates as now maintained is, as a rule,

charging more for that part of a long haul which lies in Minnesota than it is charging for the same haul when it is of traffic local to Minnesota notwithstanding the fact that in the case of the long haul the two terminal expenses are to be distributed over 550 miles to 1,510 miles according to the distance from St. Paul of the particular localities shown on the exhibit and in the case of the haul local to Minnesota, the terminal expenses are to be distributed over only 248 miles, the distance from St. Paul to the westerly line of Minnesota. For example, the rate on 4th class merchandise from St. Paul to Billings, Montana, 890 miles westerly of St. Paul, is $1.17 per 100 lbs.; the proportion based on Minesota's mileage, 248 miles, is 32.5 cents; the maximum allowed by the Order for 248 miles is 27.56 cents; so that 4th class merchandise going from St. Paul to Billings pays 4.94 cents per cwt. more for being hauled as far as Moorhead than it would pay if it were business local to the State and stopped there. One of the earliest decisions of the Interstate Commerce Commission (Farrar v. East Tenn. V. & G. Ry. Co., 1 Int. Com. Comn. Rep. 480) was that this is contrary to the rule that the rate per ton per mile should constantly decrease as distance increases and that a rate for a long haul higher in proportion to distance than that for a short haul included within the long haul is discriminatory.

The Butte Situation.

But let us examine a little further into the effect of the rates prescribed by the Minnesota Commission's Order if the Northern Pacific Company, which has put them in and now has them in effect, shall be compelled to maintain them as maximum rates and shall not be permitted to discriminate. It has been seen that if rates are reduced on merchandise from the Company's eastern terminals to Fargo, discrimination against Bismarck will ensue unless rates shall be correspondingly reduced to that city from the Company's eastern terminals; if

rates shall be reduced to Bismarck, Billings will be discriminated against unless rates are correspondingly reduced to that point; if rates shall be reduced to Billings, Butte will be discriminated against unless rates be correspondingly reduced from the eastern terminals to that point. This all grows out of the fact that prior to its adoption of the rates prescribed in the Order the Company had always maintained rates to each of these jobbing centres which allowed them fair opportunity in competition with other localities to transact a distributing or "jobbing" business in the respective districts geographically tributary to them; and on the faith of this relation of rates and its stability, considerable distributing or "jobbing" business had grown up in each of them. Any change in this relation would manifestly result in unjust discrimination in favor of the locality which received the benefit of such change, and against other localities which had under the former relation of rates been fairly able to compete with it.

It may be well here to call attention to one principle of law as well as of rate-making. It is of universal application both as a principle of law and as a practical matter of railroad operation. It is well expressed by the Interstate Commerce Commission in Geo. Tileston Mill Co. v. N. P. Ry. Co. 8 Int. Com. Comn. Rep. 354, as follows:

> "A rate can seldom be considered 'in and of itself'. It must be taken almost invariably in relation to and in connection with other rates. The freight rates of this country both upon different commodities and between different localities are largely interdependent, and it is the fact that they do not bear a proper relation to one another rather than the fact that they are absolutely either too low or too high which most often gives occasion for complaint."

In confirmation of the principle of law see Int. Com. Comn. v. B. & O. Rd., 145 U. S. 263. In confirmation of the fact of the same principle as a practical matter of operation of a

railroad see testimony of Mr. Maguire at p. 1473 G. N. Record. It is not too broad a statement that nobody knows, or can ascertain if he desires to, or cares very much, whether the rates accorded him are reasonable in and of themselves. The principal and controlling desire of everybody is to enjoy rates which are no higher than those accorded others under similar conditions, and which bear a just relation to those accorded others under dissimilar conditions. Each one desires "equality of right" which it is the great purpose of the Act to Regulate Commerce to secure.

Int. Com. Comn. v. Cin. N. O. & Tex. Ry., *supra*.
New Haven R. R. v. Int. Com. Comn., *supra*.

After this interlude, so that principles of law which we consider applicable to the facts in hand may be borne in mind, let us proceed to recite the facts. They are disclosed in the testimony of Mr. Baird at pages 1468, *et seq*. N. P. Record.

When the Northern Pacific Railroad was completed into Butte and Helena in 1883, those towns had already established commercial relations, through the Utah & Northern running northerly from Ogden to Butte, and its connection with the Union Pacific to the east, and the Central Pacific to the west, with the Missouri River cities on the east and with San Francisco and Sacramento on the west. At that time there were established equal rates on merchandise to Butte and Helena from Duluth, St. Paul, Minneapolis, Sioux City, Omaha, St. Joseph and Kansas City on the east, and from Seattle, Portland, Tacoma, San Francisco and Sacramento on the west. Butte and Helena were as the hub of a wheel with spokes representing equal rates from all these competing points. Within the past few years a line has been completed from Salt Lake City to Los Angeles, and Los Angeles has been placed on an equal basis with the other distributing centres mentioned. Inasmuch as the distance from Denver to Butte is practically 80%

of the distance from the Missouri River to Butte, rates from Denver to Butte have for many years been 80% of the rates from the other distributing centres to Butte. This entire relation has ever since existed. Rates from the Head of the Lakes and from St. Paul and Minneapolis to Butte have been reduced from time to time, and rates from all these other competing points to Butte and Helena and to all intermediate points have been correspondingly reduced, and as a rule simultaneously. This parity of rates has existed since 1883, and has never been disturbed. A large business has been built up by manufacturers, producers and jobbers at all these competing points in reliance upon this equal basis of rates.

It has been demonstrated, we think, that if the relation of rates on the Northern Pacific, which has existed for over a quarter of a century, be disturbed by a substantial reduction in rates (and the reduction made by the Order is from 20 to 25 per cent) from its eastern terminals to Moorhead, discrimination will result unless a proportionate reduction—sufficient to restore the relation—be made to Butte. It is shown by the proof, and there will be no controversy over the facts or the sufficiency of the proof, that if a reduction in rates be made from the eastern terminals to Butte, the relation of rates to Butte, which has always existed on the Northern Pacific as between St. Paul, Minneapolis and Duluth, the eastern terminals, and Portland, Seattle and Tacoma, the western terminals, will be destroyed. In our judgment this destruction will amount to as direct, undue and unlawful discrimination as the destruction of the relation above described between Moorhead and Fargo, between Fargo and Bismarck, between Bismarck and Billings, between Billings and Butte, or between St. Paul, Minneapolis and Duluth, and each of the other distributing points named with regard to the territory served by them in competition. For twenty-seven years the Northern Pacific has

preserved an equality of relation of rates to Butte and to all intermediate points from its eastern and western terminals. Let us suppose that voluntarily, without claim that any newly arising conditions demanded or justified it, the Company should destroy that relation by putting in lower through and intermediate rates from the western terminals to Butte than from the eastern, or from the eastern than from the western. In the meantime, manufacturers, producers and jobbers in both the eastern and western cities and in the intermediate cities have built up large businesses in reliance upon this parity. Can anybody question that this wilful destruction of the parity should be considered and declared upon complaint made an undue and unreasonable disadvantage to the localities given the higher rates in the re-adjustment? The fact that industries have been built up in reliance upon the parity of relation in rates may make no difference in the conclusion that a destruction of the parity would cause discrimination; but it certainly accentuates the propriety of the conclusion. The Interstate Commerce Commission recognizes this fact in its decision in Howard Mills Co. v. No. Pac. Ry. Co., 12 Int. Com. Comn. Rep. 258, in which it says:

> "When once the relation has been established, when business has developed and money has been expended upon the strength of it, then the carrier cannot, in the absence of some sufficient reason, change that relation; nor would this Commission direct a change."

But if the Company could not do it voluntarily, it is because it would be in contravention of the principal provision of the Act to Regulate Commerce forbidding discrimination; and if it would be in contravention of the provisions of that Act no State can make the Company do it. Neither may any State compel obedience to any law which compels the Company either to contravene the Act of Congress or to submit to regulation of its interstate rates by the State, which seems to be the only alternative.

We conceive, then, that if the Northern Pacific Company shall substantially lower its rates from its eastern terminals to Moorhead and Fargo, it must, to avoid undue discrimination, lower its rates from such eastern terminals to Butte, and, as well and for the same reason, lower its rates correspondingly from its western terminals to Butte. But what of San Francisco, Sacramento, Los Angeles, St. Joseph, Omaha and Kansas City? Shall they be thrown out of their parity of relation of rates?

It may be suggested that it is all a matter of competition of carriers and that the carriers may reduce their rates to an equal basis of those maintained on the Northern Pacific, or leave the business; that it is of small importance to Montana for which State, Butte and Helena are the principal commercial supply centres. But there are three components of interstate Commerce: the carrier, the shipper and the receiver. The carrier may enjoy the business by reducing rates, or leave it alone; the receiver has the low rates over the Northern Pacific in any event; but the shipper, the manufacturer, producer or distributor, who in these twenty-seven years has spent his time, energy and money in building up his business in one or the other of these centres, in reliance upon ability to compete with the Northern Pacific terminals, seems to have a decided interest in that he is no longer able to compete, unless the carrier on which he has depended for his relations with Montana shall maintain the relation with other competing points which has heretofore existed. It is apparent that he is entitled to consideration and must have it, if regulation of interstate commerce is to be considered as of national rather than of merely local importance. His condition is not the same as it would be in case of a voluntary reduction by the Northern Pacific in its rates from its terminals to Butte; for in that case he would merely be subject to changes in conditions of trade as to which he must be considered to have taken

his own risks. If interstate rates are to be regulated only by the federal government he ought to be able reasonably to rely upon a continuance of the long existing parity. But if the Order is to be enforced his condition is brought about as the necessary and direct effect of the Order.

Lest it shall be claimed that our argument with regard to the necessary and direct ultimate effect of the rates prescribed by the Order of the Commission, and the immediate effect, if discrimination now existing as a result of it shall be immediately remedied, is purely fanciful, and that our conclusions are reached by forced logic and are not practically to be realized, let us look at examples of the effect of the same forces which are shown by the proof in the case. (See testimony of Mr. Maguire pp. 799 *et seq.* G. N. Record.)

Effective October 22, 1906, the Northern Pacific, Great Northern and Minneapolis, St. Paul & Sault Ste. Marie railroads reduced voluntarily their rates in Minnesota for the transportation of coal. The reduction was allowed by the Commission on application of the Northern Pacific and Soo railroads and the Great Northern, although an interstate road from Duluth to Minnesota points, joined. (Staples p. 2747 N. P., Maguire, *ubi supra.*) Exhibit 40 Maguire in the G. N. case shows how these reductions in the coal rates made by the Great Northern company affected through rates on coal from Chicago, Ill., Milwaukee, Wis., Manitowoc, Wis., Gladstone, Mich., and all Illinois mining points. It will be borne in mind that the reduction in Minnesota was made primarily by the Northern Pacific and the Soo roads and that the coal distributed in Minnesota comes, so far as those roads are concerned, from Duluth or St. Paul. The Great Northern's business from Duluth into other points in Minnesota is interstate; but it had to meet the state rates made by the N. P. and the Soo or go out of the coal business in competitive territory. There was no complaint as to the rates on coal in any State

other than Minnesota and no primary intention on the part of anybody to reduce rates other than the Minnesota rates. The exhibit and the explanatory testimony of Mr. Maguire show that in order to meet rates at competitive points or forego the business "and discriminate against their immediate local communities," in order to preserve the parity allowing free competition, which had always existed, rates on coal were forthwith reduced from St. Paul and from Duluth to the various important commercial centres in South Dakota and North Dakota as well as Minnesota, and that equal reductions to those made from Duluth to these various points were forthwith made to the same points from Milwaukee, Wis., Manitowoc, Wis., Gladstone, Mich., Chicago and all Illinois mining points. The reduction in Minnesota in rates on hard coal effected reductions on hard coal as well from Chicago throughout Iowa and even from Chicago to some points in northern Missouri. The cause of these reductions was the necessity of preserving the relation of coal rates from the various producing markets as an alternative to putting those markets out of the opportunity of competing in these various localities which they had always enjoyed. For example, the former rate from Duluth to Aberdeen, S. D., on hard coal was $3.25 per ton. When the rates in Minnesota were reduced the Great Northern reduced its interstate rates from Duluth to points in Minnesota by force of competition of lines local to Minnesota and reduced its rates from Duluth to Aberdeen to $2.80 per ton evidently to avoid discrimination against Aberdeen in favor of Minnesota points—to preserve the former relation. The former rate on hard coal from Chicago to Aberdeen had been $3.25 per ton, the same rate as from Duluth to Aberdeen. When the rate was reduced from Duluth to Aberdeen to $2.80 per ton the rate from Chicago to Aberdeen was reduced to the same figure, this reduction being necessary to preserve the parity of Chicago as a competing point, else Chicago would have had

DARK PAGE

to go out of the business of distributing hard coal in that territory. (Maguire p. 803 G. N.)

Exhibit 41 Maguire with the explanatory testimony of Mr. Maguire (p. 804 *et seq.* G. N. Record) shows precisely the same effect upon rates to Chicago from points in southern Minnesota, North Dakota and South Dakota of reductions in rates on wheat in Minnesota traffic made by the Great Northern Company effective September 1, 1906, as are recited above on coal rates from various shipping points of Minnesota. The localities in North Dakota and South Dakota mentioned in each of these Exhibits are taken merely as examples, the reductions having been made in general and on the same basis (Maguire p. 804 G. N.). Mr. Maguire attributes these reductions on coal and grain, shown by Exhibits 40 and 41 to have been made outside of Minnesota, to "competition of markets and carriers and communities," meaning, apparently, shippers, carriers and receivers of the article shipped. The reductions in interstate rates into and out of southern Minnesota, and between North Dakota and South Dakota points and points easterly of Minnesota, the traffic in some cases not touching Minnesota at all, were made in the mutual interest of all parties concerned in the interstate traffic to which such rates applied. The reductions were not, it is true, made necessary by the Minnesota regulating power, because the reductions local to Minnesota were voluntary on the part of the local roads, but they were, nevertheless, a necessary and direct result of rates put into effect with the primary design of affecting only traffic wholly within Minnesota.

A further and most vivid illustration of the interdependence of rates to such an extent that if some rates be reduced other rates which have theretofore borne a fixed relation to them must also be reduced to avoid inequitable discrimination is furnished by the so-called Litchfield case described by Mr. Staples (p. 2765 *et seq.* N. P. Record).

Litchfield is in Minnesota on the line of the Great Northern, 66 miles from St. Paul. Complaint was made to the Commission that rates on grain out of Litchfield to Minneapolis and Duluth and on coal and lumber in from the Twin Cities and Duluth was too high. The Commission determined (p. 2768 N. P.) that "any considerable reduction at Litchfield could not be had without disturbing the relation of rates and making it necessary that certain reductions should be had at certain other points in any event." The result was an adjustment of rates on grain, coal and lumber, made by the Commission, covering different portions of all parts of the State (p. 2765 N. P.), and effecting all the chief carriers in the State (p. 2766 N. P.), both those whose business into Minnesota from Duluth was interstate and those whose business between those points was local to the State.

We think that these examples serve to demonstrate, even if the argument based upon the Butte situation were insufficient alone to make it clear, that the system of freight rates in this country is like a network of delicate threads so woven as to make a symmetrical whole and to fulfil its design of affording to all whom it may cover equality of right. Rates upon traffic wholly within a State but carried on under precisely the same conditions as interstate traffic covering the same haul, form disseverably with rates on such interstate traffic a thread or a portion of a thread in this network; and a disseverance of the harmonious relations between such state rates and such interstate rates destroys the symmetry of all that part of the fabric of which the thread which they compose forms a part or with which it is connected. In this connection, a portion of the remarks of Judge Van Devanter during a colloquy with counsel at the time of the delivering of his opinion upon the hearing of a motion for a temporary injunction in St. Louis & C. Ry. Co. v. Allen, are pertinent. He said:

"Taking as your premise that the authority of Congress is supreme and therefore in respect of interstate commerce its authority shall be everywhere equally dominant, I am not sure but that the result would be in some instances where there is such a confusion, such an interweaving, as that there could not be a separation, that there the power of Congress would be the dominant power and that the other power would not exist; not on the theory that Congress has any authority over state rates, but that since its authority over interstate commerce must reach in every part and parcel of it, Congress must say that anything that gets interwoven with it must partake of the exercise of that authority. Otherwise the power of Congress which is supreme would not be supreme."

Excepting such use of rates on other articles as has been made by way of example to show the force of an argument, we have been dealing wholly with rates prescribed by the Order of the Commission under date September 6, 1906; and, so far, with the effect of such rates upon rates for interstate traffic moving westwardly out of Minnesota. It is common knowledge that merchandise in general moves in this part of the country westwardly. Excepting for such movement as goes to the northern part of the State and to a limited district in the State southerly of the Twin Cities, practically all the movement is westwardly. Indeed southern Minnesota, let alone Iowa, is concededly "Chicago territory." (Staples p. 2875, N. P. Flynn p. 2454, N. P.)

It is well known that merchandise comprehended within the classes covered by the Order of September 6, 1906, comes into the State in large quantities from eastern points of origin —from Boston, New York, Philadelphia, Pittsburgh, various southern points, Chicago and so on—and is distributed within the State. Prior to the taking effect of the Order of September 6, 1906, the Great Northern Company had, in conjunction with

other carriers, established interstate through rates from all points south and east of the Minnesota Transfer (the Twin Cities) to all points on its lines in Minnesota. Exhibit 44 Maguire G. N., and Mr. Maguire's explanatory testimony (pp. 818-820 G. N.) shows what happened to those rates as a result of the taking effect of the state rates prescribed in the Order.

It appears that when the rates prescribed by the Order took effect the sum of locals on St. Paul—the sum of rates from the various eastern and southern points to St. Paul and those prescribed by the Order from St. Paul to points on the line of the Great Northern in Minnesota—was lower than the through rates which had been established and existed between such eastern and southern points and such points in Minnesota. This was of course, discrimination on its face against the interstate rate. The charging by the Great Northern of a larger sum for the haul between St. Paul and Crookston, for example, when it constituted a portion of a haul from Boston, for example, to Crookston, than for a local haul from St. Paul to Crookston, would have been inequitable discrimination against the interstate traffic. Therefore, and in order to avoid this discrimination, the Great Northern withdrew its through tariffs and filed new tariffs making the through rates equal only to the sum of the locals on St. Paul. This involved a general reduction of the through rates. The former rate, for example, from Chicago to Crookston, on first class merchandise was 127 cents per cwt.; the sum of the locals on St. Paul after the taking effect of the Commission's Order was 119 cents; and this is the present rate. The result of the Order was the same in the case of the Northern Pacific. It is not shown but we think that it is the understanding of the Court and counsel that such things need not be necessarily shown in both cases in order to be availed of in either.

It will be urged again, of course, if no more than perfunctorily, that the railroads need not have reduced their through

DARK PAGE

rates, that they were not under legal compulsion so to do. We admit that. But we admit it on the basis of our claim that the Order was void. If the Order of the Commission was enforceable, they were compelled in obedience to the Act to Regulate Commerce to do it. It is our position that the necessary and direct effect of the Order was either to regulate interstate rates or to compel disobedience to the supreme law of the land and that the Order was void. It was because the Order was void that we ask that the defendant railway company in each suit be enjoined from obeying it and that the other defendants be enjoined from attempting to enforce it.

It seems then that as a result of the Order the rates on all merchandise covered by it for transportation interstate from points eastwardly or southwardly of Minnesota to points in Minnesota, westwardly of the Twin Cities, have been reduced; the rates on all merchandise covered by it for transportation westwardly out of Minnesota as far as the North Dakota-Montana line have been reduced. Discrimination still exists and greater reductions and reductions covering extended territory must be made unless discrimination shall continue to exist. Will not he who claims that these reductions have not been made and need not continue to be made as a necessary and direct effect of the operation of the Order suggest why they were made, and, further, how having put in effect the rates prescribed by the Order, the carriers could have rendered obedience to the Act to Regulate Commerce without such reductions?

In Wabash Ry. Co. v. Illinois, *supra*, it was held, and we think, for all time, that a statute of a State which attempts to regulate the fares and charges by railroad companies within its limits for transportation which constitutes a part of commerce among the States is not a valid law. What a statute of a State attempts to do or what an order of a Commission using the legislature's power attempts to do is to be discerned not alone from the language of the statute or order as the case

may be but as well if not better from the necessary and direct effect of its operation. See W. U. Tel. Co. v. Kansas, U. S. Sup. Court, Jan. 17, 1910. We have shown that the through rates on merchandise to points in Minnesota on the line of the Great Northern and Northern Pacific from all points southerly and easterly of Minnesota have been reduced on account of the reduced rates prescribed for local traffic by the Order of Sept. 6, 1906, and that such reduction was made necessary by the Order to the end that palpable discrimination in charging a larger sum for a through haul than for the sum of the locals might be avoided. We have shown that interstate rates from points in Minnesota to points westerly of the State have been reduced under the same necessity and for the same reason; that interstate rates to points westerly of Minnesota now maintained are discriminatory as compared with rates for traffic local to the State in that a higher rate per ton per mile is being charged for Minnesota's mileage when it constitutes a portion of a long interstate haul than is charged when it constitutes a State haul only; and that to avoid such discrimination, such rates must be further reduced and to at least the basis of the rates prescribed as a maximum by the Order. We submit that the necessary and direct effect of the Order is in nowise different to what it would have been had it in express terms attempted to regulate the charges by the railroad companies within its limits for a transportation which constitutes a part of commerce among the States and that the Order is invalid.

2. *As to the Order of September 6, 1906, and the necessity of applying to interstate business the system or method of rate making used in the construction of the schedule prescribed by it.*

The Order does not prescribe rates between points in Minnesota, but only the method of creating the rate. The schedule is framed in this way: For each 100 lbs. of 1st class merchandise a terminal charge of 11.02 cents is allowed, and a hauling charge of ninety-eight hundredths of a cent for each five miles or fraction thereof up to 200 miles, then an additional hauling charge of the same amount for each ten miles further up to 400 miles, then for each twenty miles further up to 500 miles, which is all the distance covered by the terms of the Order. For example, for a distance of five miles the maximum rate allowed on 100 lbs. of 1st class merchandise is 11.02 cents for the terminal charge plus ninety-eight hundredths of a cent for the hauling charge, amounting to 12 cents; for a distance of over five miles and up to ten miles ninety-eight hundredths of a cent, the hauling charge for five miles or a fraction thereof, is added to the rate of 12 cents for the five miles distance, making a rate of 12.98 cents; and so on up to 200 miles. For distances greater than 200 miles ninety-eight hundredths of a cent is added to the rate for 200 miles as a hauling charge for each 10 miles or fraction thereof of distance over 200 miles, and so on up to 400 miles; and for distances greater than 400 miles ninety-eight hundredths of a cent is added to the rate for 400 miles for each 20 miles or fraction thereof of distance over 400 miles. It will be seen, therefore, that the Commission in its Order of Sept. 6, 1906, was not prescribing rates alone, but was prescribing a basis of rate-making and especially prescribing a fixed relation which maximum rates should bear to each other.

Indeed fixing the relation of rates seems to have been as important in their view as reducing rates (p. 2622, N. P.). Furthermore by the Order the relation which the classes of merchandise covered by it should bear to each other was firmly fixed for all parts of the State. The basis, including terminal charge and haul charge, for rates on each class of merchandise other than 1st class is a certain fixed percentage of that fixed for 1st class. 2d class rates are 83 1/3% of 1st class rates for the same distance, 3d class are 66 2/3%, 4th class are 50%, 5th class are 40%, Class A are 45%, Class B are 35%, Class C are 30%, Class D are 25% and Class E are 20%. The Order provides that "This order does not prevent the charging of a lower rate than that provided by Exhibit A (the schedule), but, in case a less rate is charged on one class, all classes must be reduced so as to preserve the relative relations between classes fixed in Exhibit A." Manifestly, then, if the railway company shall desire to waive the point that the State may not regulate its interstate rates touching Minnesota, and shall prefer rather to yield to the effect of the state regulation than to discriminate it must adopt for its interstate rates touching Minnesota the Commission's basis of making rates and the relation between classes and between rates for distances on which its rates within the State are created. Any other course would be intolerable. For example, 1st class merchandise on a haul from the Twin Cities to Moorhead is being, when it reaches Moorhead, and has for some distance been, hauled for ninety-eight hundredths of a cent per 100 lbs. per ten miles. It is on that basis that the rate is prescribed by the Commissioner's Order. It is opposed to the primary tenet of rate-making that the rate per mile of haul, other conditions remaining unchanged by competition or other factors, shall increase with added distance. So the rate for state traffic having been made on a certain basis, the interstate rate which is to be compared with it must, if avoiding discrimination is the object in

sight, be made on at least no higher basis, and the continued haul beyond Moorhead must not realize as revenue any greater per mile charge than for the haul when Moorhead is reached.

Again, a line of the Great Northern runs from St. Paul, its easterly terminus, to Huron, South Dakota, leaving the State of Minnesota and entering the State of South Dakota at Nassau, 173 miles from the Minnesota Transfer. Another line of the Great Northern runs from St. Paul to Sioux Falls, South Dakota, leaving the State of Minnesota and entering the State of South Dakota at Jasper, 213 miles from the Minnesota Transfer (Staples, p. 2974, N. P.). On the Huron line the Order of the Commission regulates rates for 173 miles of Minnesota traffic at which distance the progression of the rate on 1st class merchandise per five miles of haul is .98 of a cent. On the Sioux City line the Order regulates rates for 213 miles of Minnesota traffic at which distance the progression of the rate on 1st class merchandise is .49 of a cent per five miles of haul. How shall the official of the Great Northern charged with the duty of making the rates make the rates from the Minnesota Transfer to points in South Dakota on the Huron line? Evidently if he would avoid discrimination as between points on the Huron line and points equi-distant from the Minnesota Transfer on the Sioux City line he must adopt the basis on which the schedule prescribed by the Order is framed. He must, when the 200 miles distance is reached, notwithstanding the fact that it was reached in South Dakota cut the rate of progression in two as has been done at the same distance on the Sioux City line where that distance was reached in Minnesota.

A line of the Great Northern runs from St. Paul to St. Vincent, 385 miles from the Minnesota Transfer. Another line runs from St. Paul to Larimore, North Dakota, and thence on to the Pacific coast leaving the State of Minnesota and entering the State of North Dakota at Breckenridge, 208 miles from the Minnesota Transfer. Conditions attending transportation

on these lines are the same, and, if they are, the rule against discrimination requires that points equi-distant from the Minnesota Transfer shall have equal rates to and from the terminal. In fact, both the Order and the Laws complained of apparently recognize that conditions are the same for so much of the Larimore-Coast line as lies in the State of Minnesota, namely 208 miles, and for the St. Vincent line, inasmuch as like rates are prescribed for traffic local to Minnesota on that part of the Larimore-Coast line in Minnesota as are prescribed for similar distances on any part of the St. Vincent line; and a shipment from the Twin Cities to Breckenridge, 208 miles from the Transfer reaches that locality at the same rate and at the same progression of the rate as a shipment to a point 208 miles from the Transfer on the St. Vincent line. The rate being the same at the 208 miles point and the progression being the same and all conditions being the same, how can a traffic official charged with the duty of making rates in such manner as shall not unjustly discriminate against any locality in any respect whatsoever justify a higher rate between the Twin Cities and any point in North Dakota beyond Breckenridge on the Larimore-Coast line than between the Twin Cities and any point equi-distant on the St. Vincent line? We think he cannot justify as against a charge of discriminating any departure from the Minnesota basis—its method of building the rate—in establishing rates between the Twin Cities or other Minnesota points and points in North Dakota.

Again, let us consider two shipments of 1st class merchandise on the Northern Pacific main line to Mandan, North Dakota, one of which originates at the Twin Cities 238 miles easterly of the border line between Minnesota and North Dakota, and the other at St. Cloud, a distributing centre (so declared by the Commission's Order of May 3, 1907—See Ex. 2 Amended and Supplemental Bill of Complaint) 162 miles easterly of that border line. The hauling charge for the Minneapolis shipment

when it crosses the line between the States is ninety-eight hundredths of a cent per 10 miles of haul; the hauling charge for the St. Cloud shipment when it crosses the State line is ninety-eight hundredths of a cent per five miles of haul. Mandan is 200 miles westerly of the border line between North Dakota and Minnesota. If discrimination is to be avoided how shall the rate from St. Cloud to Mandan be made unless by the cutting of the hauling charge in two at the 200 mile distance as is done in the case of the rate from Minneapolis to Mandan?

Further examples may be had by comparing other lines of the Great Northern, which crosses the Minnesota border line at eight different points and by reference also to lines of the Northern Pacific which crosses the Minnesota border line at four different places, and by reference to divers other railroads, subject to the Laws and Orders complained of, which cross the State border line at from three to eight places. But the examples above given are, probably, sufficient for purposes of illustration.

The examples all go to demonstrate, we think, that if railroads situated as the Great Northern and Northern Pacific are situated are compelled to adopt a prescribed method, a fundamental basis, for the making of a schedule of rates within a State, they cannot for interstate traffic carried on over the same rails, perhaps, but, in any event, under precisely the same conditions, depart from that method or basis without undue and unjust discrimination; and that the state-made rates necessarily and directly control the interstate rates touching Minnesota not only through the necessity of applying like rates to points situate in apposition to each other, but, as well, through the necessity of applying the same system or plan of rate-making to points situated under like circumstances so far as conditions of transportation are concerned.

In this connection we desire to call particular and minute attention to Exhibits 43, 44 and 45—Baird in the Northern

Pacific record, and especially to the respective graphic charts comprehended in them. They show the difference between present interstate long haul rates of the Northern Pacific on some specimen commodities covered by Chapter 232, and on the average of the classes covered by the Order of September 6, 1906, and the rates which would be installed by the Company if the necessity of avoiding discrimination against its long haul interstate business in favor of its business local to Minnesota shall ultimately compel it to adopt the basis of the respective Minnesota schedules for its business interstate touching Minnesota. We cannot predict at what point on the line representing the progression of the Minnesota rate one who should say that the Company is not bound to follow the progression of the rate prescribed by the Law and Order respectively would declare that it was at liberty to depart from it or could depart from it in the way of raising it without discriminating against every other point beyond the point of departure.

Let us compare with a view to the relation of rates merely, the rates existing prior to the Order from the Twin Cities to specimen points westwardly with those which would be created and established by an application of the basis prescribed in the Order.

Miles.	Locality.	Former Rate.	Commission Rate.
300	Valley City, N. D.	.79	60.0
600	Demores, N. D.	.135	79.6
900	Laurel, Mont.	.198	95.3
1125	Butte, Mont.	.225	105.1

It does not need any figuring of percentages but only a momentary glance to disclose that the relation of rates to these specimen points in existence for 25 years has been mutilated beyond possible recognition.

Moreover let us compare the rates on first class merchandise from the eastern terminals to Spokane as created by an extension of the Minnesota schedule, as now existing, and as prescribed by the Interstate Commerce Commission in the still

pending Spokane Rate Case. The present rate is $3.00 per cwt.; the rate prescribed by the Interstate Commerce Commission is $2.50; the rate created by the Minnesota schedule if applied is $1.24; the rate created by the Minnesota schedule if the progression of the rate when the State line is reached be applied for the further distance—that is to say, if the provision of the schedule that when a distance of 400 miles shall be reached the progression shall be cut in two be ignored—is $1.79. It seems to us to be clear that if the Northern Pacific and Great Northern Companies are to charge $2.50 to Spokane, and shall approach and cross the Minnesota-North Dakota State line at a progression of ninety-eight hundredths of a cent per ten miles of haul, somewhere between that line and Spokane there must be a raise in the progression of the rate in order to reach the prescribed rate to Spokane.

In any event, it is demonstrable that, in so far as discrimination lies in violent disruption of the relation of rates between localities when that relation has existed for many years and communities have not only acquiesced in it but have been born and developed in reliance upon it, discrimination would result from any endeavor on the part of the railway company to apply the schedule prescribed in the Order to its interstate business touching Minnesota.

Let us suppose that North Dakota, Montana, and the other States which the Northern Pacific and Great Northern traverse should be possessed of the same desire to prescribe a method of rate-making, a classification and a relation between the classes, and should each follow that desire and adopt a plan of its own. We are not suggesting that the federal government should also exercise its discretion and enforce its own rules in the way of regulation, because, in considering this particular topic, it is presumed not to have any. But if other States should assume to exercise their powers in the same manner that the Commission in its Order of Sept. 6, 1906, has assumed to

exercise Minnesota's, can anybody be worse confounded than the traffic officials of a railroad company who should strive to obey all the several mandates as to system of rate-building, classification and relation between classes which the different States might severally design and promulgate? Railroads could be no worse off under the postage stamp system—a fixed charge for whatever distance.

But another phase of the question presents itself for consideration. The railroad companies prescribe their rates on the basis of the Western Classification. The Act to Regulate Commerce, as well as all state laws and orders, provides that the railroad companies shall publish and file a full schedule of rates. Because of the manifest impossibility of filing a schedule which shall show rates for all articles of whatsoever kind which may be the subject of transportation, schedules are made for classes, and the respective classes are made to include such articles as common experience has taught ought, for the purpose of rate-making, to be co-related. The Court said in Int. Com. Comn. v. C. G. W. Ry. Co. *supra*, that the Act to Regulate Commerce leaves railroads "free to classify their traffic" as they were at common law. The rate-regulating powers claim and exercise the power to classify. Mr. Staples, in behalf of the Minnesota Commission (p. 2825 N. P.) declares that the power to make classes is as important as the power to make rates, since if railroad companies be permitted to make their own classification, they don't care very much who makes the rates because they can manipulate the rates by changing the classification and can discriminate just as wickedly and unjustly as they can by changing the rates. See also N. Y. Board of Trade v. Tenn. Ry. Co., 4 Int. Com. Comn. Rep. 526. This power of classification is exercised freely (Maguire p. 398 G.N.). Minnesota adopts the Western Classification but has prescribed exceptions with regard to 242 articles, the effect of each exception being to drop the excepted article into a lower class,

that is to say, a class taking a lower rate. The rate prescribed by Chap. 232 on soft coal is a notable example of the beneficent effect of the ability to classify as viewed from the standpoint of the regulating power. No difference in cost of transportation as between hard coal and soft coal can be figured. But soft coal and hard coal bear to the people of Minnesota, in the opinion of the rate-making power, the relation of a necessity and a luxury (Staples p. 2707 N. P.) and therefore soft coal is made a favored commodity as to rates. The carrier cannot complain of the low rates on soft coal, in any event if it pays the mere cost of carriage, provided its entire schedule of rates provides it with income sufficient to pay its charges and a reasonable return upon the value of its property. Indeed it seems to be clear in the minds of all witnesses in these suits that the question whether any particular rate does or does not provide its share of a reasonable return to the railway company is, as a practical matter, unsolvable.

The reasonableness of its return from its entire state schedule of rates is to be determined from the state business alone without regard to its interstate business or its business in other States, and is to be calculated on the value of its property devoted to the state business.

Smyth v. Ames, 169 U. S. 466.

The State of North Dakota is not interested in soft coal. It has its lignite industry to promote. It prefers to place the burden of the railways on some other subject of transportation. Even though in nearly all respects the subjects of transportation in which it is particularly interested are the same as those in which Minnesota is particularly interested, it may, in consideration of all its interests, prefer to make lower local rates on some commodities and higher on others than Minnesota. Minnesota has cast 242 articles of transportation, besides those for which special rates are provided in Chap. 232, into a lower and less remunerative class. It goes without saying that those

articles are important in the matter of the revenue of the carrier. North Dakota may cause 242 other important articles to be carried for less compensation than is prescribed for the classes in which they are placed by the Western Classification on the basis of which the railroad companies estimate their entire revenue. The Interstate Commerce Commission may have its views as to what commodities ought to carry the burden and what ought to produce sufficient revenue to the carriers so that, on the whole, considering its entire schedule, it shall earn enough that its property shall not be confiscated. The railroad companies must adopt for their interstate business touching Minnesota and North Dakota the lowest rate prescribed by either potentate or discriminate. In addition to the fact that the policy of the Federal Government as to classication may easily be controlled by a State which desires to classify certain articles on a lower scale than seems proper to the Interstate Commerce Commission, it seems clear that the net result to the railroad for its operation under the various classifications may be such as to yield an insufficient return on its property. It has no redress as against the rates prescribed by either of the regulating potentates. The entire schedule dictated by each is sufficient. It can find no Court which has jurisidiction to defend it against the action of all three powers and it has no remedy, excepting such as lies in discrimination.

Is it amazing that Mr. Staples, one of the defendants, as a member of the Railroad Commission, and apparently charged by it with the duty of supporting the validity of the Laws and Orders involved in these suits, should have yielded to his own native sense of fair logic and declared:

> "I don't believe anybody appreciates more than I do the condition the railway companies find themselves in when they undertake or necessarily when they yield to the con-

trolling or the undertaking to control of state and national authorities." (Staples p. 2907 N. P.)

This language was used by Mr. Staples in answer to a question whether he did not think state policy would control federal policy and override it in case it were the policy of the States to allow to a railroad company a rate of return of only seven per cent on the value of the property employed in the public service and of the federal government to allow a rate of return of fifteen per cent and rates should be limited by each power on the basis of yielding the rate which it considered proper. Mr. Staples goes on to say that if the Courts should sustain both sovereignties, the States and the national government, in the exercise of their powers, "the railway companies would be up against it" (ibid.). And in full realization of the impossibilities of common carriers subject to the domination of both state and federal powers existing at all, let alone thriving, unless the various powers shall prescribe harmonious regulations, he declared that

> "all the influence that I have been able to use and whenever opportunity presents, is directed to as near a co-operation with federal authorities as possible and to secure co-operation of state authorities, both upon legislation and upon regulation and control." (*ibid.*)

This apparently absolute conviction of the supremacy of the power of the States in controlling the exercise of the national power perhaps brings forth a triumphant note in Mr. Staples' address before the National Association of Railway Commissioners at Washington in 1907, in which he said:

> "There have been many general rate reductions in different States followed by reductions in interstate traffic, and, so far as we know, these have been brought about by the affirmative action of the state authorities. So far as we are advised, we know of no general reduction due to any action by the federal authorities." (Staples p 3029 N. P.)

From what has been said it must be admitted that these reductions in rates on interstate traffic "brought about by affirmative action of the state authorities" have been brought about by the necessity which railroads have felt themselves under not to discriminate against interstate traffic as compared with traffic local to States; and the necessity, therefore, in case state rates shall be reduced, of reducing interstate rates to such an extent as shall preserve the proper relation between rates, whether for local or interstate traffic, which had theretofore existed and ought of right to exist. It is the opinion, apparently, of Mr. Staples that such reductions in interstate rates have not been and are not legally compulsory but have been made by the railroads "from the point of view of what might be reasonable or just" (Staples p. 2871 N. P.); "in undertaking to do (what I assume to be) justice by the carrier to the community served" (ibid., p. 2879); through "moral influence" (ibid., pp. 2898-9). All this means, of course, is that the railroads have reduced interstate rates following reductions in state rates to avoid discriminating against interstate traffic.

Again the state schedule as an entire schedule may be wholly reasonable—that is to say, under it the company may earn a sufficient revenue to provide a reasonable return upon the value of that portion of the property of the railroad devoted to the business wholly within the State. But the schedule may be so constituted that the rates provided between Moorhead and the eastern terminals of the company, where the principal amount of the interstate business of the company touching Minnesota either originates or terminates, may be wholly unreasonable as the basis of the interstate schedule to points in North Dakota and beyond. We expect hereafter to show that regardless of the question whether the entire Minnesota schedule is sufficient of itself, it is so constituted that, if discrimination is to be

avoided and the basis of the schedule is therefore to be extended to the interstate business of the company, it is, as to that business, utterly unreasonable.

Furthermore, whether any rate prescribed on any particular article to Moorhead is reasonable is not a matter to be determined, at least if it pays the cost of carriage. It lies within the power of regulation to classify. The state regulating power exercises this power, the railroads in the first instance exercise it in setting forth their schedules of interstate rates and have the right to do so (Int. Com. Com'n. v. C. G. W. Ry. Co., *supra*), and the Interstate Commerce Commission in execution of its powers under the Act has the right to amend the classification made by the railroads and freely exercises it. Unless the classification made by the State and which cannot possibly be made on rules capable of exact application (P. & G. Co. v. Cin. H. & D. R'd Co., 4 Int. Com. Com'n. Rep. 87) shall agree with that made by the railroads or by the Interstate Commerce Commission, as the case may be, an avenue is open for the utmost discrimination no rate involved in which may be subject to criticism on the ground that it is not reasonable in and of itself.

The subject is a large one, and the examples of the necessary effect of the Order in either controlling interstate rates or rendering the provision of the Interstate Commerce Act prohibiting discrimination unenforcible may be multiplied beyond patience or necessity of the Court. It is demonstrated, we think, absolutely that as a railroad company could not voluntarily put in a relation of rates in one locality bounded only by artificial lines, and a totally different relation in an adjoining locality the circumstances and conditions of which were the same, it could not maintain this difference of relation under authority of a State if the result would be to cause discrimina-

tion against interstate traffic. Much less could it be compelled to maintain this unequal relation under compulsion of a State, or to avoid the necessity for it by surrendering its Congress-given right to install its own reasonable schedule of interstate rates, to classify its traffic and generally to manage its own affairs as it had a right at common law to handle them. We think that it has been demonstrated beyond question that the necessary and direct effect of the Order upon interstate rates is to control the rates, the method of building the rates, the relation between rates for different distances, the classification of traffic and the relation of rates as between the classes or to cause discrimination against interstate rates to an unlimited extent and in an unlimited variety of ways. If the Order is upheld as valid we submit that the federal power in the regulation of interstate rates is curtailed to such an extent as to render its exercise of little worth.

3. *As to Chapter 232 General Laws of Minnesota 1905.*

Many of the principal arguments advanced to support our contention that the Commission's Order of Sept. 6, 1906, is unconstitutional as an interference with interstate commerce apply with equal force to our proposition that Chap. 232 Gen. Laws Minn. 1907, is unconstitutional for the same reason; and the principal arguments advanced in this subdivision of our discussion of the subject apply with as much force upon our claim that the Order is void under the Constitution as upon our claim that the statute, which we deal with principally in this subdivision, is void. But it is probable that the applicability of the argument to the facts can be more readily comprehended if each law and order in the suit be treated separately.

The Commission's Order is based on the so-called Western Classification "with exceptions and changes made by the Railroad and Warehouse Commission of Minnesota," and covers ten classes, some of which are less-than-car-load and some of which are car-load lots. Chapter 232, passed subsequently to the promulgation of the Order, creates seven additional car-load classes numbered eleven to seventeen inclusive and prescribes maximum car-load rates for these classes so created; provided that if any carrier shall at the time of the taking effect of the Act be maintaining a lesser rate than that prescribed by the Act as a maximum the Act shall not be construed as permitting the raising of that rate. Class eleven contains wheat and thirteen other articles which, apparently, in the opinion of the legislature are corelative with wheat for transportation purposes; class twelve contains corn and thirty-seven corelative articles; class thirteen contains lumber, lath, shingles, sash, doors and blinds; class fourteen contains sheep in double-decked cars and cattle; class fifteen contains sheep

in single-decked cars and hogs; class sixteen is hard coal; and class seventeen is soft coal.

The rates for each class are prescribed for a distance of five miles and for each multiple thereof up to 200 miles and then for each ten miles of increased distance up to 400 miles. It is not to be discerned that there is any fixed percentage relation between the classes or any exact constant rate of progression of the rate as distance increases. The schedule does, however, recognize a cardinal rule of rate-making that the hauling charge shall decrease with increasing distance. For example, the increase in the maximum rate to be charged for a ton of soft coal for 200 miles over 100 miles is 34 cents or 3.4 mills per ton per mile, while the increase for 400 miles over 300 miles is 18 cents or 1.8 mills per ton per mile.

The proof is that all the main lines and branches of the Northern Pacific excepting between Duluth and Staples, between St. Paul and Pine City and in the Bad Lands in North Dakota go through grain fields which extend as far westwardly as the North Dakota-Montana state line and to some extent in Montana. (Baird, p. 1435, N. P.) Grain is shipped in substantial quantities from nearly all stations in these fields to Duluth, Minneapolis and Superior. As between different stations in this field whether situate in Minnesota or North Dakota conditions are substantially the same so far as transportation is concerned (ibid., p. 1436).

The reductions proposed by Chap. 232 in rates on wheat and other articles in class eleven and coarse grains in class twelve are substantial as shown by Exhibit 44—Baird, and by Exhibit 40—Baird. For example, the present rate on wheat from Wahpeton, N. D., and Breckenridge, Minn. (taking the same rate) to Duluth is 11.5 cents per cwt.; the rate proposed by Chap. 232 to Duluth from Breckenridge is 10 cents per cwt. a

difference of 1.5 cents per cwt. The act provides that a car-load of wheat shall contain 24,000 pounds as a minimum, and the maximum prescribed for a minimum car-load from Breckenridge to Duluth is $24 per car as compared with the present interstate rate from Wahpeton to Duluth of $27.60; so the rate prescribed by Chap. 232 for a car-load of wheat from Breckenridge to Duluth is $3.60 less than the present rate maintained by the Northern Pacific from Wahpeton to Duluth. Breckenridge and Wahpeton are, as has been seen, to be considered as one town; and, if the rate on wheat from Breckenridge to Duluth is to be decreased by $3.60 per minimum car-load, Wahpeton will be discriminated against by so much unless the interstate rate from Wahpeton to Duluth shall be decreased to a parity with the state rate from Breckenridge to Duluth. When it is borne in mind that the price of wheat is fixed by the current price at a principal market less the freight rate to that terminal and is figured to an eighth and even to a sixteenth of a cent a bushel, this discrimination against Wahpeton seems to be sufficiently substantial to demand a remedy.

The present rate on soft coal for the interstate haul from Duluth to Wahpeton is $2 a ton. The rate proposed by Chap. 232 from Duluth to Breckenridge is $1.31 per ton. Chap. 232 provides that a minimum car-load of coal shall be 30,000 pounds or 15 tons; so the difference between the proposed legislative rate from Duluth to Breckenridge and the present interstate rate from Duluth to Wahpeton on a car-load of soft coal is $10.35, by which amount discrimination will exist against Wahpeton in favor of Breckenridge if the legislative rates shall be installed and the present interstate rate to Wahpeton shall not be reduced.

Similar discrimination against border towns in North Dakota in favor of border towns in Minnesota will exist in the rates for each class created and covered by Chap. 232. The proof is clear and ample that as to each class conditions sur-

rounding shipment are the same regardless of the question whether the point of origin of the shipment or the point of destination, as the case may be, is in Minnesota or North Dakota. (Baird, pp. 1435-1438.) Shipments of coal originate at Duluth and Superior and the distribution is in all the Northern Pacific territory east of about Jamestown, North Dakota, 350 miles west of Duluth, and the volume of traffic is heavier in North Dakota easterly of Jamestown than in the westerly 100 miles in Minnesota. (Baird, p. 1437.) Shipments of lumber originate at Duluth, Cloquet, Little Falls and other points in Minnesota and are destined to points in Minnesota and North Dakota (ibid., p. 1437). Shipments of livestock originate in eastern Montana, North Dakota and Minnesota and go to South St. Paul or Chicago. As to all commodities moving eastwardly no distinction in conditions attending transportation excepting as affected by distance is to be made whether the shipment originates in Minnesota, North Dakota or Montana or whether it finds its destination in one of the eastern terminals in Minnesota or in Superior, Wis. As to all commodities moving westwardly no distinction is to be found whether the shipment originates at one of the Minnesota terminals or at Superior, Wis., or whether it is destined to points in Minnesota or in North Dakota. Any assertion that North Dakota being a more sparsely settled State than Minnesota ought to endure higher rates or even a higher basis in its mileage proportion of interstate rates is safely forestalled by reference to Mr. Baird's testimony (p. 1450, N. P.) showing that in 1907 according to the Handbook of the Department of Agriculture the production of wheat, the principal product of each State, was 31,011 bushels per mile of railway in North Dakota as against 25,480 bushels per mile of railway in Minnesota, and by reference to Mr. Maguire's testimony (pp. 895-8, G. N.) showing that in 1902 North Dakota furnished for transportation on the Great Northern 896,764 tons of wheat and 1,215,240 tons of all grains including

wheat; that it furnished yearly a constantly increasing tonnage up to 1908 in which year it furnished for transportation 1,000,997 tons of wheat and 1,358,351 tons of all grains including wheat; that, on the contrary, Minnesota in 1902 furnished for transportation on the Great Northern 784,832 tons of wheat and 895,575 tons of all grains including wheat; that it furnished a constantly decreasing tonnage yearly till 1908 in which year it furnished for transportation 292,442 tons of wheat and 486,565 tons of all grains including wheat; that per mile of railway in the respective states North Dakota in 1908 furnished to the Great Northern for transportation 3.7 times as many tons of grain as Minnesota. This testimony seems to us to support Mr. Baird's opinion that a higher basis of rates in North Dakota than in Minnesota cannot be justified and Mr. Maguire's opinion (p. 898, G. N.) that the rate of progression for a long interstate haul out of North Dakota to the eastern terminals cannot be raised above that for the shorter haul local to Minnesota without discriminating against North Dakota.

Rates on commodities such as wheat and other grain, livestock, etc., are of much more immediate effect upon the prices of those commodities than in the case of merchandise of a higher class. Therefore discrimination results more quickly and its effect is felt more acutely in case of inequality of rates on such articles as wheat and livestock (Staples, pp. 2811, 2879, N. P.) than on merchandise of a higher class. Recognition of this fact by the rate-making authorities of the railway companies is well proven by Exhibit 67—Baird, and Mr. Baird's testimony in explanation of it (p. 2187 *et seq*). The Exhibit shows five lines of railway running substantially parallel from the latitude of Fargo to the latitude of Grand Forks and East Grand Forks. One of these lines is owned by the Soo Company, one by the Northern Pacific, and three by the Great Northern. Of the Great Northern's lines one is situated in the Red River Valley on the easterly side of the river in Minnesota

and another in that valley on the westerly side of the river in North Dakota. The declared purpose of the exhibit is to demonstrate the truth of the proposition that what is or is not a reasonable rate depends on its relation to other rates more than on any other factor. There are six tiers of towns on these lines of railway situate at distances from Duluth and depending most largely on which line they are situate, varying from 230 to 354 miles. The tiers of towns are distant each from its nearest town across country from 12 to 16 miles. The rates on wheat and coarse grains have been maintained by the railway companies from each of these towns to Duluth uniformly at eleven cents per cwt. It is Mr. Baird's opinion that any adjustment of rates which would materially interfere with this existing relation would work a discrimination against the towns disadvantageously affected. Mr. Staples fully recognizes the existence and force of this principle (pp. 2811, 2884 N. P.). But the legislative rate (Chap. 232) on wheat to one of these points shown on Exhibit 67 is 9.9 cents per cwt. as a maximum and on coarse grain 8.7 cents per cwt. as compared with the present uniform rate of 11 cents on each commodity. Manifestly then, if the rate must be put in, the towns on the western side of the Red River—on the line of the Great Northern in North Dakota—must have the same rate as the towns in Minnesota on the easterly side of the river or discrimination in fact will result; and this discrimination will affect the towns which suffer it as to wheat in all their business (Baird, p. 1455, N. P.).

Mr. Staples in his testimony indulges in the exploitation of a method of extending the rate prescribed by Chapter 232 for the transportation of cattle (apparently using cattle merely as an example) by the application of which the Northern Pacific Company may use the rates in Chapter 232 to its advantage in long haul business. As we understand the method it is this:

The prescribed rate on cattle for 400 miles is 20.7 cents per cwt., making $4.14 per ton for 400 miles or, for that distance,

one and thirty-five thousandths cents per ton per mile. If the rate for hauls longer than 400 miles be extended at the same rate per ton per mile the figures produced and read into the record (p. 3001, N. P.), disclose that for hauls from Wibaux, Montana, and points beyond to St. Paul the rate created will be larger than the rates now maintained by the Company.

The rate for the last 200 miles of a 400 mile haul of cattle as prescribed by chapter 232 is 2.2 cents per cwt., or four and four-tenths mills per ton per mile; the same haulage charge being allowed by chapter 232 for the distance between 200 and 300 miles, and for that between 300 and 400 miles (Ex. A Amended and Supplemental Bill of Complaint). It is not to be discovered on what theory Mr. Staples or anybody else can justify at the 400 mile point of a long haul a raise in the hauling charge, which has remained steadfast for 200 miles at four and four-tenths mills per ton per mile, to one and thirty-five thousandths cents per ton per mile for increased distance over 400 miles. The fact is that, unless each subsequent point after the 400 mile distance is reached shall suffer discrimination in its rate, the hauling charge for the distance after 400 miles must remain at least no greater than it has been up to the 400 mile point. Furthermore the rate for 400 miles upon which Mr. Staples in his testimony calculates the rate per ton per mile to that point includes two terminal charges—the initial and the final. It may make no difference in the principle involved because if it is allowable to raise the rate of progression of the rate (the per ton per mile haulage charge) at the 400 mile point, it is apparently allowable to raise it by one amount as well as by another. But it is apparent that the method suggested by Mr. Staples for advancing the rate with increasing distance over 400 miles covers four terminal charges for a haul of 800 miles and five for a haul of 1,000 miles, the distance from Livingston to St. Paul. Inasmuch, therefore, as the terminal charges allowed by chapter 232 for cattle is 3.9 cents per cwt.

it is not significant that when five instead of two terminals are allowed for in the method of extension of the rate proposed by Mr. Staples the rate derived by the application of such method should be higher than that now maintained by the Company.

Our contention is that the rate of progression of the rate cannot be increased with increasing distance without discrimination against localities situate at greater distances from the point of origin of the shipment than that at the point at which the rate of progression increases. If we are wrong about that, Baird's Exhibits 43, 44 and 45 with the respective graphic charts showing the effect upon the present long-haul interstate rates of the Company of an extension of the basis of the Minnesota rates to long-haul interstate business are of no particular importance. If we are right in that contention, then the respective graphic charts with the line of progression of the Minnesota basis of rates as applied to long-haul interstate business in comparison with the line representing present interstate rates of the Company are full of significance.

In further illustration of the effect of the rates prescribed by chapter 232 on long-haul interstate business of the Northern Pacific Company we have prepared the following table showing in the first column the present rates of the Company on cattle in cents per cwt. to St. Paul from the various points selected by Mr. Staples for the exploitation of his theory (p. 3001, N. P.); in the second column the rates which would be derived by the application of the method of extension suggested by Mr. Staples; in the third column the rates which would be derived by the extension of the Minnesota schedule.

Station.	Miles from St. Paul	Present Rate in cents per Cwt.	Staples Rate in cents per Cwt.	Extended Rate in cents per Cwt.
New Salem	477	26.5	24.7	22.4
Hebron	519	27.5	26.9	23.4
Medora	598	32.5	30.9	25.1
Wibaux	634	32.5	32.8	25.8
Glendive	665	32.5	34.4	26.5
Miles City	743	34.	38.4	28.2
Rosebud	776	35.	40.1	29.
Big Horn	831	36.	43.	30.2
Custer	837	37.	43.3	30.3
Huntley	878	38.	45.4	31.2
Billings	890	40.5	46.1	31.5
Laurel	905	40.5	46.8	31.8
Columbus	931	41.	48.2	32.4
Big Timber	971	44.	50.2	33.3
Livingston	1005	45.	52.	34.

19,000 lbs. to a minimum car-load. $20.90 per car-load reduction from Livingston to St. Paul caused by extension of the Minnesota schedule.

The testimony of Mr. Tittemore in the Minneapolis and St. Louis case discloses the widespread and disastrous effect of the discrimination which will necessarily follow as a result of the installation of the reduced rates for transportation within the State of wheat prescribed by Chapter 232 unless interstate rates shall be correspondingly reduced (pp. 871 *et seq.* and Exhibit 20 M. & St. L.) It discloses the following facts:

When railroads began to be built in Minnesota and wheat began to be grown, tariffs were established from various points in the State to Minneapolis, the primary market, and from there to various eastern and foreign markets. Subsequently Minneapolis by virtue of its possession of water power began the milling industry, which has resulted in its becoming the largest flour producer in the world. The milling-in-transit

privilege was established. Through this privilege the owner of wheat at any point in Minnesota, North Dakota or South Dakota could ship his wheat to Minneapolis, have it forwarded from there as wheat, or milled there and forwarded to Chicago in the shape of flour, en route to the broader market, by paying the tariff rate from his place of shipment to Minneapolis plus a fixed sum, for many years 7.5 cents per cwt. Forthwith people in interior towns desired to engage in the milling business, but manifestly could not do so unless accorded rates which would permit them to compete in this respect, at least, with the Minneapolis miller assisted by the milling-in-transit privilege. A similar milling-in-transit privilege was therefore accorded to such interior towns and on a parity of rates with Minneapolis. Many interior mills were established in reliance upon this parity. Mr. Tittemore gives as examples, in towns located on the line of the Minneapolis & St. Louis, mills at Wells, Sleepy Eye, New Ulm, Fairfax, Waseca, Montgomery, etc., (p. 874, M. & St. L.). These mills were established under a guaranty that the rates on wheat in and on flour out to Chicago should never exceed the rates on wheat from the same point of origin to Minneapolis and 7.5 cents additional—the additional sum being the amount of the proportional rate from Minneapolis to Chicago on wheat or the produce of wheat. This practice of according to the interior miller the same advantage of rates as was accorded to the Minneapolis miller has been applied to millers at every point in Minnesota (p. 875, M. & St. L.). The effect of destruction of this relation can be readily seen from this example. Taking Sherburne, Minn., as the wheat producing point and New Ulm, Minn., as the interior milling point; the present rate on wheat from Sherburne to Minneapolis is 9.5 cents per cwt.; the fixed rate on the product flour from Minneapolis to Chicago is 7.5 per cwt.—a total from Sherburne to Chicago with the milling-in-transit privilege at Minneapolis of 17 cents per cwt.; the

proposed rate (Chap. 232) from Sherburne to Minneapolis is 7.5 cents per cwt. making with the proportional from Minneapolis to Chicago a through rate with the milling-in-transit privilege of 15 cents; the present rate from Sherburne to New Ulm or to Fairfax with the milling-in-transit privilege, and then on to Chicago is equal to the present rate with the same privilege by way of Minneapolis. A reduction of two cents per cwt. in favor of Minneapolis effected by Chapter 232 will throw the New Ulm and the Fairfax millers out of business and throw the Minneapolis & St. Louis Company out of its interstate business to Chicago, unless the railroad shall reduce its milling-in-transit rate from Sherburne via New Ulm and Fairfax to Chicago by the same amount as the reduction effected by Chapter 232 from Sherburne to Minneapolis. The reduction in rates on wheat caused by Chapter 232 will cause all wheat tributary to Minneapolis and competing primary markets to flow to Minneapolis (p. 889 M. & St. L.) unless a corresponding reduction be made in the interstate rates from all original points of shipment *via* interior milling points to Chicago.

We do not here dwell on the necessary discrimination which will result against elevators on lines running to Chicago, but without Minneapolis connections, in favor of elevators in the same locality on lines running to Minneapolis, nor on elevators in border Iowa or South Dakota towns as compared with those in neighboring border Minnesota towns, and to the necessary and direct effect of "drying up" the Iowa or South Dakota or the Chicago-connection elevators, as the case may be, through discrimination unless the interstate rates shall be reduced to an equality with the local rates (p. 894, M. & St. L.).

We might add without going into details that in the same manner and by the application of the same principles the local rates on coarse grain will effect either discrimination or a corresponding reduction in interstate rates as has been illustrated in the case of wheat (pp. 895, *et seq.* M. & St. L.). It is perhaps

sufficient to direct attention to the testimony of Mr. Tittemore that a preservation of the relation of rates under which the railroad and its industries have worked for years will necessitate the reduction of rates to Chicago and Minneapolis from all points in thirteen counties in Iowa if the proposed rates on coarse grain for traffic local to Minnesota shall go into effect (p. 899, M. & St. L.).

The effect on interstate rates of the reduction in local rates on coal, both hard and soft, prescribed by Chapter 232 is also shown clearly by the testimony of Mr. Tittemore, but in an inverse manner. Coal comes into Minnesota; wheat and coarse grains and their products go out. The competitive points for distribution of coal into Minnesota are Duluth, Minnesota; Superior, Ashland, Green Bay, Manitowoc, Sheboygan, and Milwaukee, Wisconsin; Gladstone, Michigan; Chicago, Illinois; the Peoria District; the Springfield District; the La Salle District; and the Streator District (p. 899, M. & St. L.). The matter is complicated. It has to do with junction points, protection of industries, competition of carriers and so on, and, perhaps, cannot be dealt with better than by referring to the testimony of Mr. Tittemore. It is at pp. 902-9, M. & St. L. Record. The effect of it is that, if the coal rates prescribed by Chapter 232 for transportation local to Minnesota shall be put in, the necessary result of competition of carriers and markets and of necessity of protection to communities and to industries which have been established under parity of rates on coal as between the various competing points of distribution will be to lower interstate rates from all those points, not only into southern Minnesota, but, as well, to save discrimination through destruction of the long existing relation of rates, into Northern Iowa.

Mr. Tittemore's testimony is to the same effect as to the necessary and direct effect upon interstate rates of the rates prescribed in Chapter 232 for transportation within Minnesota of

lumber (p. 960, M. & St. L.) and of cattle (p. 961-964, M. & St. L.), as in the case of coal.

What gives an atmosphere of verity to the testimony of Mr. Tittemore as to the necessary and direct effect of the rates prescribed by Chapter 232 on interstate rates, is that that effect was not considered either by him or traffic officials of other railway companies as remote and merely to be expected at some indefinite time in the future as an indirect result of the installation of the legislative rates. Chapter 232 was approved April 18, 1907, and was by its terms to take effect June 1, 1907. As soon as it was approved traffic officials of all roads doing business in Minnesota met and ordered a rate-check. The interstate rates on the Minneapolis & St. Louis were checked in in precisely the same manner that Mr. Tittemore testifies they must necessarily be checked in if the rates prescribed in Chapter 232 become effective and were checked in by other roads in the same manner. The tariffs of the Minneapolis & St. Louis Company containing the interstate rates, changed in all respects as Mr. Tittemore testifies they would necessarily be changed as a result of the state rates prescribed by Chapter 232, were prepared and were placed in the hands of the agents of the company with instructions to use them. An order in this suit restraining the enforcement of the provisions of Chapter 232 by the Attorney General of Minnesota and the performance thereof by the railway company was served on the 31st of May, 1907, the day before the act by its terms became effective; and the cause of the necessity of the change in the interstate rates having been removed, at least for the time being, the change has not yet been made (pp. 965-8, M. & St. L.).

4. *As to the Act approved April 4, 1907, prescribing maximum rates for transportation of passengers.*

One of the laws complained of in these suits is the so-called two-cents passenger law, being an Act of the Legislature of Minnesota approved April 4, 1907, effective by its terms May 1, 1907, providing for transportation wholly within the State a maximum charge of two cents per mile for passengers of twelve years of age or over, together with baggage not exceeding 150 pounds in weight and of one cent per mile for passengers under twelve years of age together with baggage not exceeding 75 pounds in weight.

Prior to the taking effect of this law on the first of May, 1907, the general basis of rates for transportation of passengers between any two points on the Northern Pacific system had been three cents per mile for passengers of twelve years of age and over and one and one-half cents for passengers under twelve years of age (Cleland, p. 1601, N. P.). At the time of the installation of the two-cents rate in Minnesota no immediate change was made in rates for interstate passenger traffic touching Minnesota excepting with regard to two or three stations in Wisconsin intermediate between Duluth and the point at which the Northern Pacific after having entered Wisconsin again enters Minnesota on its Duluth-Minnesota interstate line (Cleland, p. 1604, N. P.). Perhaps the reason for the failure to change at least some interstate rates simultaneously with the installation of the reduced Minnesota rates was the physical impossibility of preparing interstate tariffs in time for compliance with the provisions of the Interstate Commerce Act (Ibid.).

Forthwith, however, the necessity for reducing rates for all interstate transportation touching Minnesota, at least to the sum of the locals based on the Minnesota state line, became

manifest—and in the manner disclosed by Exhibits 49, 50 and 51 Cleland in the Northern Pacific case. Exhibit 49 shows that the increase in passenger revenue for business in Minnesota to and from Moorhead for the month of May, 1907 (the first month of the operation of the Minnesota two-cents law) over the month of May, 1906, was 647%, while eliminating Moorhead business the revenue for transportation local to the State showed a decrease of 2% in May, 1907, as compared with May, 1906.

Exhibit 50 shows that in June, 1906, there were sold between St. Paul or Minneapolis on the one hand and Moorhead or East Grand Forks on the other, 172 tickets, and between St. Paul and Minneapolis on the one hand, and Fargo or Grand Forks on the other, 984 tickets; that in the same month, 1907, there were sold between St. Paul or Minneapolis on the one hand, and Moorhead or East Grand Forks on the other, 4,037 tickets, and between St. Paul or Minneapolis and Fargo or Grand Forks 173 tickets.

Exhibit 51 shows that in May and June, 1906, one full cash fare was collected on a train between Moorhead and St. Paul or Minneapolis, whereas in those two months in 1907 there were 1,168 full cash fares and 82 half cash fares collected on such trains.

The showing of these exhibits can, of course, lead to only one conclusion:—The necessary, direct and immediate effect of the two cents passenger law was to deprive the Northern Pacific Company of a large portion of its interstate business through Moorhead. The law immediately and directly influenced and affected the amount of the interstate commerce of the Company. It came then squarely under the principle of the case of Louisville & K. Ry. Co. v. Eubank, 184 U. S. 27 (1901). In that case the constitutionality of a provision of the constitution of Kentucky that it shall be unlawful to charge a greater compensation for a short haul than for a long haul including the short haul, was under consideration. It had been applied as between

a short haul intrastate and a long haul interstate. The Supreme Court says:

"The contention is that the State does not prescribe or regulate the rates outside of its borders; that the Company may announce and enforce any rate it pleases regarding interstate commerce. It simply directs that between points within the State of Kentucky the charge shall not be greater for a shorter haul than for a longer haul, even though such longer haul may be between a point outside and one inside of the State; that this does not constitute an interference with or a regulation by the State of interstate commerce, and hence the provision is valid.

"If this contention were correct, and the constitutional provision, as construed by the State Court, did not by its enforcement regulate, or immediately and directly influence and affect the interstate commerce of defendant, either as to amount or rates, the provision in question would be valid. But is it correct? And is there no such immediate influence upon or regulation of the interstate commerce of the defendant?"

"If the State of Kentucky has the right to base its provision for the rate of a short haul within its own borders by comparison with the rate for a longer haul partly within and partly without its own borders, notwithstanding the direct effect of a limitation arrived at by such comparison may be the regulation or even the suppression of the interstate commerce of the carrier, then this provision is valid; otherwise, it would seem to be the reverse."

"The result of the construction of this provision by the Court below is in effect to prohibit the carrier from making a less charge for the transportation from Nashville to Louisville than from Franklin to Louisville, or else to make a charge that will prevent its doing any business between the States in the carrying of tobacco. The necessary result of the provision under the circumstances set up in the answer directly affects interstate rates, or in other words, directly affects interstate commerce, for it directly affects commerce between Nashville and Louisville.

"We fully recognize the rule that the effect of a state constitutional provision or of any state legislation upon interstate commerce must be direct and not merely incidental and unimportant; but it seems to us that where the necessary result of enforcing the provision may be to limit or prohibit the transportation of articles from without the State to a point within it, or from a point within to a point without the State, interstate commerce is thereby affected, and may be thereby to a certain extent directly regulated, and in that event the effect of the provision is direct and important and not a mere incident.

"The facts in this case have been thus fully referred to for the purpose of showing how directly and also how injuriously such a provision might affect interstate commerce. Other cases may be supposed, where the effect might not be so oppressive. But the fact which vitiates the provision is that it compels the carrier to regulate, adjust or fix his interstate rates with some reference at least to his rates within the State, thus enabling the State by constitutional provision or by legislation to directly affect, and in that way to regulate, to some extent the interstate commerce of the carrier, which power of regulation the Constitution of the United States gives to the Federal Congress."

Our contention in this regard is that if it were lawful, as seems to be claimed by our adversaries, for the Northern Pacific Company to maintain at the same time its three cents per mile interstate fares through Moorhead, and its two cents per mile fares in Minnesota to or from Moorhead, it was entitled to enjoy its lawful rights with regard to interstate transportation free from interference by any law of any State; that the law of Minnesota resulted in depriving it directly and immediately of its lawful rights in that regard. To say that the Northern Pacific had the right to transact interstate business so far as the law of the State is concerned, that its lack of power to enjoy its interstate business was due to the action of the individual passengers and not to that of the State seems absurd.

All it means is that conceding that a state law cannot alone deprive a carrier of its interstate business, a state law in combination with an individual acting under it may do so.

But, notwithstanding the seeming facility with which interstate passengers avoided the effect of the discrimination in fares maintained by the Company as between transportation to and through Moorhead, discrimination in fact still existed. It existed against a passenger who, applying for a ticket to or from or through Minnesota interstate, was not aware of the fact that he was charged more than the sum of the locals; it existed against a passenger with a trunk which he could not check through unless on a through ticket; it existed against a passenger who found it necessary to use a sleeping-car. The condition of the Northern Pacific was intolerable and it remedied it as soon as it could install new interstate tariffs. Meantime the State of Wisconsin had enacted a two cents per mile passenger fare law and the State of North Dakota a two and one-half cents per mile law, the former effective August 1, 1907, and the latter July 1, 1907. Exhibit 52—Cleland shows the former interstate rates between St. Paul and specimen points in North Dakota, the present interstate rates between the same points, and the total amount of reduction divided as between the mileage in Minnesota and North Dakota respectively. For example, the former fare between St. Paul and Dawson, North Dakota, was $11.45; the present fare is $8.50; there is a difference of $2.95, of which $2.38 is attributable to the mileage in Minnesota between the Twin Cities and Moorhead and the reduction in rates on that mileage from the former basis of three cents per mile to the statutory basis of two cents per mile, and the balance of fifty-seven cents is attributable to the reduction from the three cents per mile basis caused by the North Dakota two and a half cents per mile law.

Exhibit 53—Cleland shows former interstate fares from specimen eastern points such as New York and Detroit to speci-

men western points on the line of the Northern Pacific such as Bismarck, North Dakota, Helena, Mont., and Seattle, Wash., as compared with present fares between the same points, and, with Mr. Cleland's explanatory testimony, the proportional amount of reduction in the former rate brought about by the laws of the respective States which the route of travel traverses. Taken together these exhibits and Mr. Cleland's testimony in explanation of them are designed to prove and do amply prove the averment in the Amended and Supplemental Bill of Complaint in the Northern Pacific case that

> "since the taking effect of such act approved April 4, 1907, and the adoption by the defendant Company of the maximum rates specified therein for its passenger business within the State of Minnesota such Company has been compelled to reduce and has reduced all its rates for the interstate transportation of passengers out of, into or through the State of Minnesota."

Finally, we think that it has been fully demonstrated that the Order of September 6, 1906, has resulted in a substantial reduction in rates on merchandise for interstate traffic touching Minnesota, and will result in still greater reductions and in reductions covering a greater extent of territory; that the two cents maximum passenger rate law approved April 4, 1907, has resulted in a substantial reduction in rates on passengers for interstate traffic touching Minnesota; that the law approved April 18, 1907, will result in a substantial reduction in rates on commodities covered by that law for traffic interstate touching Minnesota and even for such traffic wholly without Minnesota but closely related to traffic within Minnesota. We think that it has been fully demonstrated that these reductions

have been, or will be, the necessary and direct result of the operation of the Order and the Acts respectively. It at least has been demonstrated that these reductions have seemed necessary, so far as they have been made, and seem to be necessary, so far as they will be made in the future, for two reasons: first, to avoid discrimination against interstate localities forbidden by the Act to Regulate Commerce; second, to avoid encroachment upon the right of the carrier to enjoy its interstate business by patrons who, availing themselves of the state-made rates, shall transform their interstate traffic touching Minnesota into traffic under two contracts, one of which shall be local to the State. We cannot now conceive why the reductions have not been and will not be necessary for each of these reasons. It will be argued, of course, that nevertheless the reductions have been and will be purely voluntary on the part of the carriers—that the discrimination against interstate localities, growing out of the maintenance at the same time of the state-made rates and higher interstate rates, would not have been a discrimination in violation of the Act to Regulate Commerce, and, if it would have been, the reduction was necessary in order to bring the higher interstate rates only to the level of the reasonable state rates; and that the enjoyment of its interstate business is a right given by Congress only upon condition that the rates derived from it shall not be discriminatory as compared with reasonable state-made rates.

We say again that, if the discrimination would not have been in violation of the Act to Regulate Commerce, the Congress in passing that Act has failed to fulfil the design of the power under which the Act was passed. We say again that if Congress has power only to prescribe interstate rates which shall be in consonance with state-made rates, the power of Congress is not supreme over interstate commerce, but subordinate to that of the States, because whichever sovereignty rightfully declares one of two necessarily co-related rates to be reasonable

controls the question of the reasonableness of the other rate. Further, and this seems to be wholly conclusive on the question, whether rates are reasonable in and of themselves depends not on consideration of any particular rate so much as on the entire schedule of rates vouchsafed to the carrier; whether discrimination exists depends upon consideration of the particular rates in question. The power to classify goes hand in hand with the power to make rates. If the Congress shall choose to classify differently to the State, schedules provided by each within conceded powers may be reasonable as a whole; but particular rates in the schedule may be utterly and irremediably discriminatory.

In conclusion, the Great Northern and Northern Pacific railroads are transcontinental systems of great national importance. Each joins the waterways of the Great Lakes with the Pacific Ocean. Each traverses territory of as largely undeveloped and rapidly developing industrial capacity as exists in the country. The business of each which is local to the State of Minnesota, though important in itself, is, when compared to its interstate business, of comparative insignificance. The freight business of the Northern Pacific, for example, which is local to the State of Minnesota is but 2.67% of its entire freight business and 12.33% of its entire freight business touching the State. Its local passenger business in Minnesota is but 5.79% of its entire passenger business and 67.21% of its passenger business touching the State. (Ex. 54—Johnson, N. P.)

As it is apparent that the business of the companies local to the State is comparatively insignificant, so necessarily must it appear that their local business is comparatively of small importance to the inhabitants of the State when compared with the interest of the people at large in their general interstate business. It is clear that the business of these two companies is of national interest rather than local and to an extent per-

haps as great as that of any carrier in the country. They never have considered state lines in making rates or otherwise regulating their traffic; they have always carried on their business on a national basis, so to speak, rather than on a local. If either of them should circumscribe an area by artificial boundaries and prescribe rates different, either in the amount of particular rates, the relation of rates to each other, the progression of the rates with added distance, or in any other respect in which rates may differ, to rates prescribed for an adjoining area which possessed conditions surrounding transportation wholly equal to those of the circumscribed area, how could it defend against a charge of discrimination? If it could not make such defence if it should establish such unequal rates of its own accord in an area of its own selection, could it successfully defend on the ground that it had established them in an area bounded by state lines, and that its discrimination was only against interstate localities? And if it could not, would its position be changed by the plea that the law of a State justified it?

We have stated, perhaps more than once, during the progress of these suits, that we did not maintain and never, under present conditions, should be heard to maintain that a State has no power to regulate rates for traffic wholly within its limits. We have admitted and do admit that the States have that power "unless what is done amounts to a regulation of foreign or interstate commerce." Our entire argument is based on the propositi hat the exercise of the conceded powers of the States is subordinate to that of the conceded powers of the Congress.

Each law and order complained of is void in that: In its necessary operation and effect it substantially interferes with and hampers the enforcement of the Act to Regulate Commerce; it burdens and regulates interstate commerce; it substantially hampers and interferes with carriers in the enjoyment of those

common law rights which Congress, through its lack of regulation, has declared shall be enjoyed freely; it places carriers in such position that they cannot obey the Act to Regulate Commerce and enjoy their rights under it and at the same time obey the law or order.

JARED HOW,

Solicitor for Complainants.

IN THE

Supreme Court of the United States.

JOHN A. KNOTT, H. R. OGLESBY AND FRANK A. WRIGHTMAN, RAILROAD AND WAREHOUSE COMMISSIONERS, AND ELLIOTT W. MAJOR, ATTORNEY GENERAL OF THE STATE OF MISSOURI,
Appellants,
v.
CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY,
Appellee,
No. 595.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY,
Appellant,
v.
JOHN A. KNOTT, H. R. OGLESBY AND FRANK A. WRIGHTMAN, RAILROAD AND WAREHOUSE COMMISSIONERS, AND ELLIOTT W. MAJOR, ATTORNEY GENERAL OF THE STATE OF MISSOURI, ET AL.,
Appellees.
No. 611.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

BRIEF OF WILLIAM T. THOMPSON, ATTORNEY GENERAL OF THE STATE OF NEBRASKA, *AMICUS CURIÆ.*

STATEMENT.

As other counsel for the state of Missouri will have fully covered the matter, a general statement of the case will

not be attempted in this brief. Neither will a full discussion of all material matters be undertaken for the same reason. The argument will cover more particularly the points in which the state of Nebraska is collaterally interested, with a view to showing the court the inconsistencies and fallacies in the contentions of the railroad. While there will necessarily be some reiteration and duplication of matters that may appear in the brief for the state of Missouri, it is hoped that same will be excused on the ground that this presentation may bring some phases of this case before the court from viewpoints other than those which may be adopted or presented by counsel more directly interested, and in the further hope that the court may be assisted hereby in finding the true solution for some of the grave problems involved. To the end that the questions may in this brief be discussed with the least confusion, parts only of the evidence in this case of Chicago, Burlington & Quincy Railroad Company will be referred to and no attempt will be made to fully analyze the testimony of the witnesses for the state. Deductions arrived at in the one case must necessarily affect all, as the principles involved are practically identical.

ARGUMENT.

I.

The internal commerce of the state of Missouri is under control of the state.

This proposition has been sustained by the supreme court of the United States in numerous cases. It was announced by Chief Justice Marshall in 1824 in *Gibbons v. Ogden*, 9 Wheat. 194, as follows:

"The completely internal commerce of a state, then, may be considered as reserved for the state itself."

This doctrine was affirmed by the same court in 1887, wherein Justice Field said:

"The internal commerce of a state—that is, the commerce which is wholly confined within its limits—is as much under its control as foreign or interstate commerce is under the control of the general government." (*Sands v. Manistee River Imp. Co.*, 123 U. S. 295.)

It was also reaffirmed in *Moore v. American Transportation Co.*, 24 How. 39, wherein the court held:

"The purely internal commerce and navigation of a state is exclusively under state regulation."

So, in *Covington & Cincinnati Bridge Co. v. Kentucky*, 154 U. S. 210, Justice Brown, giving effect to the same principle, said:

"Under this power, the state may authorize the construction of highways, turnpikes, railways and canals between points in the same state, and regulate the tolls for the use of the same."

Still more recently the supreme court of the United States, in more concrete form, announced the same doctrine as follows:

"Railroad companies, from the public nature of the business by them carried on and the interest which the public have in their operation, are subject as to their state business to state regulation, which may be exerted either directly by the legislative authority or by administrative bodies endowed with power to that end." (*Atlantic Coast Line v. North Carolina Corporation Commission*, 206 U. S. 1.)

Numerous authorities in addition to the above might be cited as sustaining the foregoing principles. Enough, however, are cited to establish the principle that a state may not only, through its legislature, fix the rate to be charged by common carriers, but the legislature may also delegate that power to an inferior administrative or legislative tribunal.

A pertinent distinction exists between the attitude of one who places his property to such a use that the public has an interest in it and the one who devotes his property to the discharge of a public service. A different rule applies to the one than to the other. The right of legislative interference does not apply in the same degree to the one as to the other. The legislative authority over the one is more limited and restricted than the authority to control the other. This distinction is recognized by the supreme court of the United States and should be borne in mind in the consideration and determination of the questions involved in the cases at bar. This distinction is aptly stated by the late Justice Brewer in the case of *Cotting v. Kansas City Stock Yards Co.*, 183 U. S. 79, 93, in the following language:

"While we have said again and again that one volunteering to do such services cannot be compelled to expose his property to confiscation, that he cannot be compelled to submit its use to such rates as do not pay the expenses of the work, and therefore create a constantly increasing debt which ultimately works its appropriation, still is there not force in the suggestion that as the state may do the work without profit, if he voluntarily undertakes to act for the state he must submit to a like determination as to the paramount interests of the public?

"Again, wherever a purely public use is contemplated the state may and generally does bestow upon the party intending such use some of its governmental powers. It grants the right of eminent domain by which property can be taken, and taken not at the price fixed by the owner, but at the market value. It thus enables him to exercise the powers of the state, and exercising those powers and doing the work of the state is it wholly unfair to rule that he must submit to the same conditions which the state may place upon its own exercise of the same powers and the doing of the same work? It is unnecessary in this case to determine this question. We simply notice the arguments which are claimed to justify a difference in the rule as to property devoted to public uses from

that in respect to property used solely for purposes of private gain, and which only by virtue of the condition of its use becomes such as the public has an interest in."

It is said in *Covington v. Sandford*, 164 U. S. 578, as follows:

"Each case must depend upon its special facts and when a court, without assuming itself to prescribe rates, is required to determine whether the rates prescribed by the legislature for a corporation controlling a public highway are, as an entirety, so unjust as to destroy the value of its property for all the purposes for which it was acquired, its duty is to take into consideration the interests both of the public and of the owner of the property, together with all other circumstances that are fairly to be considered in determining whether the legislature has, under the guise of regulating rates, exceeded its constitutional authority and practically deprived the owner of the property without due process of law. * * * The utmost that any corporation, operating a public highway, can rightfully demand at the hands of the legislature when exerting its general powers is that it receives what, under all the circumstances, is just compensation for the use of its property as will be just both to it and the public."

And in *Smyth v. Ames*, 169 U. S. 464, the court, after reviewing its own previous decisions in rate cases, laid down this rule:

"We hold, however, that the basis of all calculations as to reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public. And in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stocks, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be

given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property. What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of the public highway than the services rendered by it are reasonably worth."

The rates prescribed by the Maximum Rate Law considered in *Smyth v. Ames* had never been put in operation and the conclusion reached by the court that the law was confiscatory was a probable conclusion based upon the application of those rates to the business of the railroads during the three previous years. The finding of the court as to the effect of the rates upon the business of the seven roads which were defendants in the action is thus stated by Mr. Justice Harlan:

"We are of opinion that as to most of the companies in question there would have been, under such rates as were established by the act of 1893, an actual loss in each of the years ending June 30, 1891, 1892 and 1893; and that, in the exceptional cases above stated, when two of the companies would have earned something above operating expenses, in particular years, the receipts or gains, above operating expenses, would have been too small to affect the general conclusion that the act, if enforced, would have deprived each of the railroad companies involved in the suits of the just compensation secured to them by the constitution."

So it appears that *Smyth v. Ames,* while laying down general principles and affirming the doctrine that the constitutional limit of legislative power is the right to establish reasonable maximum charges, furnishes no practical standard or test of the reasonableness. Considering the present scope of the decisions upon this sub-

ject Mr. Justice Brewer in *Cotting v. Goddard,* 183 U. S. 79, after reviewing *Smyth v. Ames* and other rate cases, said:

"As to parties engaged in performing a public service, while the power to regulate has been sustained, negatively the court has held that the legislature may not prescribe rates which if enforced would amount to a confiscation of property. But it has not held affirmatively that the legislature may enforce rates which stop only this side of confiscation, and leave the property in the hands and under the care of the owners without any remuneration for its use. It has declared that the present value of the property is the basis by which the test of reasonableness is to be determined, although the actual cost is to be considered, and that the value of the services rendered to each individual is also to be considered. It has also ruled that the determination of the legislature is to be presumed to be just, and must be upheld unless it clearly appears to result in enforcing unreasonable and unjust rates."

In determining whether the freight and passenger rates fixed by the legislature of Missouri of 1905 and 1907 are lawful, or confiscatory and therefore unlawful, it should be borne in mind that they are engaged in business in which the state or general government might engage. When an individual engages in a business properly within the scope of government, when he takes upon himself a function of the state and exercises for his own advantages one of the powers of government, as suggested by Mr. Justice Brewer in *Cotting v. Goddard,* 183 U. S. 79, it may be "that he voluntarily accepts all the conditions of public service which attach to like service performed by the state itself."

The decision of the supreme court of the United States cited in *Smyth v. Ames,* 169 U. S. 466, contained expressions indicating that under some circumstances rates or charges fixed by the legislature for a distinctively public

service may not, although unremunerative, come under the ban of the 14th amendment. It is not shown in the cases at bar that the rates stricken down are not to some extent remunerative.

II.

The burden to conclusively prove the confiscatory character of rates of transportation established by a state constitution, legislature or an administrative board exercising legislative functions, is cast upon the one who assails such rates as unconstitutional.

It is clear that when the state, either by constitutional provision, by its legislature, or by an administrative board exercising legislative functions, in the exercise of its authority to control its domestic commerce and to prevent extortion in charges for transportation, fixes a rate or rates the same are *prima facie* valid and cannot be set aside by a court, except upon clear and convincing evidence that they violate some provision of the federal constitution.

"On a bill to restrain the board from carrying into effect a schedule of rates so established on the ground that they are so low as to be ruinous to the business of the road, if the evidence as to the probability of loss is so conflicting that the effect of the rates is doubtful, and largely dependent on future developments, and only about 4 per cent. of the local traffic will be affected by the reduced rate, relief will not be granted until experience has demonstrated that the rates are not compensatory." (*Chicago, B. & Q. R. Co. v. Dey*, 38 Fed. 657.)

"A state rate statute is to be regarded as *prima facie* valid, and the *onus* rests on the carrier to prove the contrary." (*Ex parte Young*, 209 U. S. 126.)

A rate law is surrounded with the presumption of con-

stitutional validity. It is presumed that the legislature acted with full knowledge of the facts upon which the legislation is based. (*Chicago, Milwaukee & St. P. Ry. Co. v. Tompkins,* 176 U. S. 173.)

"Under previous decisions of the court the legislative rate is to be taken as presumptively reasonable." (*Ruggles v. Illinois,* 108 U. S. 541.)

"In approaching the consideration of a case of this kind (a rate case) we start with the presumption that the act of the legislature is valid, and upon any company seeking to challenge its validity rests the burden of proving that it infringes the constitutional guarantee of protection to property. The case must be a clear one in behalf of the railroad company or the legislation of the state must be upheld." (*Chicago, Milwaukee & St. P. Ry. Co. v. Tompkins,* 176 U. S. 173.)

"It is not to be supposed that the legislature of any state, * * * will engage in a deliberate attempt to cripple or destroy institutions of such great value to the community as the railroads, but will always act with the sincere purpose of doing justice to the owners of railroad property, as well as to other individuals. * * * And if the rates established * * * are not conclusive, they are at least *prima facie* evidence of what is reasonable and just." (*Reagan v. Farmers' Loan & Trust Co.,* 154 U. S. 395.)

A rate law ought not to be set aside except on the clearest proof of the confiscatory character of the rates. Jurisdiction invoked to set aside or suspend the operation of a statute, constitution or order fixing rates should only be exercised in the clearest cases. (*Knoxville v. Knoxville Water Co.,* 212 U. S. 1-16.)

In *Ex parte Young,* 209 U. S. 123, it was said:

"Finally it is objected that the necessary result of upholding this suit in the circuit court will be to draw to the lower courts a great flood of litigation of this charac-

ter, where one federal judge would have it in his power to enjoin proceedings by state officials to enforce the legislative acts of the state, either by criminal or civil actions. To this it may be answered, in the first place, that no injunction ought to be granted unless in a case reasonably free from doubt. We think such rule is, and will be, followed by all the judges of the federal courts."

So, in the case of *San Diego Land & Town Co. v. National City,* 174 U. S. 739, it is held:

"Judicial interference should never occur unless the case presents, clearly and beyond all doubt, such a flagrant attack upon the rights of property under the guise of regulation as to compel the court to say that the rates prescribed will necessarily have the effect to deny just compensation for private property taken for the public use."

As also in *San Diego Land & Town Co. v. Jasper,* 189 U. S. 439, it was held:

"In a case like this we do not feel bound to re-examine and weigh all the evidence, although we have done so, or to proceed according to our independent opinion as to what were proper rates. It is enough if we cannot say that it was impossible for a fair-minded board to come to the result which was reached."

The necessity for proving by conclusive proof the confiscatory character of rates before a statute fixing rates should be enjoined or suspended by a court was further considered in the case of *Wilcox v. Consolidated Gas Co.,* 212 U. S. 19, which case was decided January 4, 1909, wherein the court held:

"Upon a careful consideration of the case before us we are of opinion that the complainant has failed to sustain the burden cast upon it of showing beyond any just or fair doubt that the acts of the legislature of the state of New York are in fact confiscatory."

Again in the case of *Knoxville v. Knoxville Water Co.*, 212 U. S. 1, the rule was stated as follows:

"The courts, in clear cases, ought not to hesitate to arrest the operation of a confiscatory law, but they ought to refrain from interfering in cases of any other kind."

III.

In a suit by a carrier to enjoin the enforcement of rates fixed by a state for the transportation of persons and property, testimony that operating expenses under statutory rates would deprive the carrier of its right to proper earnings, is insufficient where the nature and necessity of important items of expenses are not disclosed.

The evidence in the cases at bar is insufficient to justify the circuit court in suspending the operation of rates. The evidence fails to bring the cases within the rule repeatedly announced by this court in that it does not prove "conclusively," or "beyond fair or reasonable doubt," that the rates are confiscatory. It was incumbent upon the companies assailing the rates to make a full and complete disclosure of all material facts, and to show the reasonableness and necessity for the expenditures made under the head "operating expenses," which they have not done.

In attacking the constitutionality of rates established by law, it is insufficient for the carrier to show that the net revenue remaining after deducting what is termed "operating expenses" is not enough to afford a reasonable return on the value of the property devoted to the business, without showing that such expenditures are both reasonable and necessary.

There is no evidence in the record, nor has the railroad company in any way undertaken to show, that important expenses charged are either reasonable or necessary. This is a fatal defect in the proof. Without proof of the reasonableness and necessity for important items of expense, the court is unwarranted in suspending, by injunction, the operation of rates established by the laws of the state of Missouri. There is no evidence to show the amount paid by the company to its officers for salaries, or whether such salaries were reasonable and necessary to the proper management of the business of the company, or whether they devoted their entire time to the business of the company. Without such proof the lack of proper earning capacity cannot be shown, no matter what method of computation is used to disclose the expenses of operation.

If the state is permitted to exercise its power to control internal commerce and prevent extortion by railway companies, it is necessary to know what all the legitimate operating expenses are, including the salaries of officers. If the legislature, in enacting a law, or a court in passing upon its validity, does not inquire into the amount and necessity of salaries, the reasonableness thereof, and the reasonableness or necessity for other important items charged as operating expenses, railway companies at will can absorb all their increase or earnings at all times by increasing salaries and charging unnecessary and unreasonable items to operating expenses.

A rule, therefore, has been adopted to the effect that a rate cannot be lawfully set aside on testimony that the operating expenses exceed the earnings, or that after operating expenses are deducted from the earnings an insufficient amount is left to pay taxes, rentals and a reasonable return on the value of the property devoted to the business, in the absence of a full disclosure of all

material facts, especially the nature and necessity of material items of expenses charged to the cost of operation. (*Chicago & Grand Trunk R. Co. v. Wellman*, 143 U. S. 345.)

In the cases at bar the testimony of the carrier is fatally defective in these respects. For anything appearing in the evidence, the company, even on its own method of computation, may be able to earn substantial profits and ample return on the value of the property devoted to the business if it allow only reasonable and necessary salaries to its officers and other reasonable and necessary items of operating expenses. On such a condition of the record the court cannot lawfully strike down a rate statute as unconstitutional, without transcending the rules established by this court.

Chicago & Grand Trunk R. Co. v. Wellman, 143 U. S. 339, was a suit to annul a statute reducing passenger rates on the ground that its enforcement would prevent reasonable earnings on investments in property of the railroad. The amount of the operating expenses was stipulated by the parties, or stated by two witnesses, without disclosing fully the nature of the different items. In deciding this case Justice Brewer said:

"It is agreed that the defendant's operating expenses for 1888 were $2,404,516.54. Of what do these operating expenses consist? Are they made up partially of extravagant salaries; fifty to one hundred thousand dollars to the president, and in like proportion to subordinate officers? Surely, before the courts are called upon to adjudge an act of the legislature fixing the maximum passenger rates for railroad companies to be unconstitutional on the ground that its enforcement would prevent the stockholders from receiving any dividends on their investments, or the bondholders any interest on their loans, they should be fully advised as to what is done with

the receipts and earnings of the company; for if so advised, it might clearly appear that a prudent and honest management would, within the rates prescribed, secure to the bondholders their interest, and to the stockholders reasonable dividends." (*Chicago & Grand Trunk R. Co. v. Wellman*, 143 U. S. 345.)

In addition to this Justice Brewer, in the case above cited, further said:

"Can it be, under these circumstances, that the court erred in peremptorily refusing to instruct the jury that an act fixing a maximum rate at two cents per mile is unconstitutional? Is the validity of a law of this nature dependent upon the opinion of two witnesses, however well qualified to testify? Must court and jury accept their opinions as a finality? Must it be declared, as matter of law, that a reduction of rates necessarily diminishes income? May it not be possible—indeed, does not all experience suggest the probability—that a reduction of rates will increase the amount of business, and, therefore, the earnings? * * * We do not mean to insinuate aught against the actual management of the affairs of this company. The silence of the record gives us no information, and we have no knowledge outside thereof and no suspicion of wrong. Our suggestion is only to indicate how easily courts may be misled into doing grievous wrong to the public, and how carefully they should be to not declare legislative acts unconstitutional upon agreed and general statements, and *without the fullest disclosure of all material facts.*"

In the cases at bar the carrier has stated in general terms what its gross receipts and operating expenses were. It has failed to make a full disclosure of what these operating expenses consist. It has not disclosed that material items thereof were reasonable or necessary. So far as the evidence in these cases is concerned, it does not present for the company any stronger case than that presented by the stipulated facts in the case of *Chicago & Grand Trunk R. Co. v. Wellman, supra.* The insufficiency

of the evidence in these cases is as glaring as the insufficiency of the testimony in that case. If the law ought not to have been stricken down in the *Wellman Case*, on account of the insufficiency of the disclosure of facts made by the railroad company, it ought not to be stricken down in this case.

Hence, it is respectfully submitted that the evidence is insufficient to justify the conclusion reached by the circuit judge to the effect that the rates complained of, if enforced, would take the property of the company without due process of law or just compensation, in violation of the federal constitution.

IV.

The revenue basis for the division of expenses can under no condition disclose the exact or proper proportion of expenses between various classes of traffic when the factors are unequal.

While, as the learned trial judge says, and as the witnesses for the railroad company insist, simplicity and uniformity are desirable in finding the ultimate result, yet this theory will not be adopted by the court in the final adjudication at the expense of accuracy or justice. The very conditions which by it are claimed to have been avoided, by the methods adopted, are brought about and emphasized by the use of the revenue basis for the division of expenses as between interstate and *intra*-state business.

Speaking now more directly with regard to the freight business of the railroad company. It is clearly shown in the evidence, and admitted by it, that the *intra*-state freight rates are, on an average, more than two times

what the rates are on the same classifications and commodities for the interstate traffic. So that, the factors or the rates which produce the gross revenues not being equal, the result of a division on the revenue basis, for determining the apportionment of expenses, can under no condition be proper or even approximately correct. This is very readily illustrated. Take for demonstration the second example shown in Exhibit 27c (Trans. 1315), illustrating the revenue accruing from the movement of a trainload of corn between Kansas City and St. Louis; the train contains 30 cars of corn, 10 of which pass through Missouri from Kansas City to St. Louis *en route* to Memphis, Tenn., 10 of which passing over the same route are destined to Mobile, Ala., and 10 of which originating in Kansas City, Mo., are destined to St. Louis; and all the cars are assumed to be of the same weight. The ratio of expense to earnings, as shown in the testimony of Mr. Sturgis (Exhibit 1, Trans. 244), for the state of Missouri, was, for the year 1905, 88 per cent. This would produce an expense, for handling the entire train illustrated, of $583.44. Now, on the basis of the division as demanded by Mr. Sturgis the revenue, expenses and net revenue on the 30 cars contained in the train would be as follows:

	Revenue	Expenses	Net Rev.
10 Cars Interstate.....	$132.00	$116.16	$15.84
10 Cars Interstate.....	171.00	150.48	20.52
10 Cars *Intra*-state	360.00	316.80	43.20
Total	$663.00	$583.44	$79.56

But the actual conditions, with these 30 cars all moving in the same train and receiving exactly the same service, ought not to produce any different cost for handling or transportation. Divided then on the basis of cost of service the example would become as follows:

	Revenue	Expenses	Net Revenue
10 Cars Interstate.....	$132.00	$194.48	Loss $62.48
10 Cars Interstate.....	171.00	194.48	Loss 23.48
10 Cars *Intra*-state	360.00	194.48	Gain 165.52
Total	$663.00	$583.44	$79.56

The only possible difference which could be charged, in the matter of excess of expenses in the one case above the other, would be a difference in the actual terminal expenses, which would, however, necessarily be slight for the cars would all receive practically the same amount of switching in the terminal yards at both Kansas City and St. Louis. The only additional expense which could possibly be charged against the *intra*-state shipment would be the cost of switching from the elevator or industry track into the yards at Kansas City, and from the yards to the elevator or industry track at St. Louis. Under these conditions which of the methods would appeal to the unbiased judicial mind as being the more natural or reasonable method of apportioning expenses? The revenue basis in this instance not only overcharges *intra*-state for expenses, thereby robbing it of its just share of net profit, but at the same time reduces in the same amount the expenses which are properly chargeable to the interstate and produces to that business an apparent profit not actually earned. When this method is used, the carrying of interstate business is permitted at extremely low rates and covers up on much of the interstate traffic *losses* actually incurred resulting from inadequate interstate rates, and thus further concealing the real fact that the interstate and not the *intra*-state rates are confiscatory. No argument or rule can possibly be advanced which could make it appear within reason that for the distance over which these cars were carried, within the state, that 10 of them could produce more wear on the roadway, track or equipment than any 10 of the

interstate cars. No argument or sophistry can be advanced to mislead the court into the belief that there was any difference whatever in the cost of transportation, traffic, or general expense than the possibly slight difference in the terminal cost referred to. The expenses of conducting the traffic are generally fixed without regard to the rates that may be charged. A carload of freight in a train will produce a certain amount of cost and expense for transportation over a certain distance, regardless of whether the car is through, interstate in or out, or *intra*-state freight, or whether it earns any revenue whatever, and no flight of the imagination should mislead one to believe that a change of rates without changing the conditions of traffic or service could increase the expense at all.

Mr. Sturgis, auditor of the Chicago, Burlington & Quincy Railroad Company, presents Exhibit 1 and Final Exhibit 42 among a great many others, apportions the expenses as shown therein by the revenue basis, and insists upon their adoption, claiming for them practical, though not mathematical, accuracy, aside from the alleged extra cost of service in conducting the *intra*-state business. If, now, this revenue theory proposed by the railroad company and adopted by the trial court is, as claimed, correct, then a change in the rates without changing the conditions or the amount of traffic should not disturb the expenses, but any such changes should be reflected only in the gross revenue and the net income. That the method is not consistent and does not accurately set forth the proper division of expenses nor reflect the actual conditions of the traffic is clearly illustrated in the tabulations attached hereto, wherein the figures in Exhibits 1 and 42 presented to the court by Mr. Sturgis are used as a basis. The actual operating expense being used in these tabulations, taxes and so-called proportion

of rental, which is interest on bonds and dividends on stocks, being eliminated from the calculations.

The first table presented shows the revenues as distributed by Mr. Sturgis in part 2, percentages, of Exhibit 42. The expenses taken, as shown in Exhibit 42, at $8,078,807.55 are apportioned to the various classifications of revenue in the ratio of the gross earnings, as shown in part 2 of Exhibit 42. Assuming now that, by Mr. Sturgis's mode of procedure, which is the one set out in this table, the apportionment of expenses is, as claimed by him, practically accurate and the proper apportionment, this being the theory adopted by the trial court, and then assuming that the *intra*-state freight and passenger rates are increased 50 per cent. and the business not changed but the same amount carried under exactly the same conditions and with a performance of the same service for conducting the traffic, the revenue then for the *intra*-state freight becomes $2,474,498.60 and for the *intra*-state passenger $2,053,118.92, an addition to the gross revenue for *intra*-state freight of $824,832.87 and for *intra*-state passenger $684,372.97. Now, if, as claimed by Mr. Sturgis, the expenses as heretofore divided by him produce the true apportionment, a mere advance in the rates should not disturb the net income. But, following out the theory on which Mr. Sturgis's exhibits are made, and which was adopted by the trial court, without taking into consideration any alleged extra cost for the *intra*-state as against the interstate service, the percentage of division of expenses now becomes altered in all the classifications, notwithstanding only two of them have been affected by the change in rates, and the net income to the miscellaneous earnings is increased over $80,000 notwithstanding it had no part in the earning of said increase nor in the change in the rate of earnings. The *intra*-state passenger net earnings which should have

been increased about $684,000 are only increased to the amount of $387,000, while the interstate passenger earnings which had no part in the earning of this additional gross income are now increased $114,000. The net income for the *intra*-state freight, which by the increase in rates should have been increased about $825,000, was only increased to the extent of $465,000, while the net revenue of the interstate freight which had no part in the earning of the additional gross revenue is increased in the amount of $463,000. The losses in the net revenue, which should have accrued under this example to the *intra*-state passenger and *intra*-state freight by this unconscionable revenue theory of apportionment, had the effect of reducing the expenses for the miscellaneous and interstate traffic, thus enhancing their net income without having in any way contributed to the larger earnings.

Taking these same basic figures of Mr. Sturgis and assuming an increase in the *intra*-state freight and passenger rates of 100 per cent., or double, and not disturbing by any change of rates the incomes for the miscellaneous or interstate traffic, the *intra*-state gross earnings for the passenger business would then have been $2,737,491.90 and for the *intra*-state freight traffic the gross earnings would have become $3,299,331.46. The percentages are, of course, again disturbed on all the classifications, not merely on those which were changed by reason of the advance in rates; and these percentages when applied to the expenses produce a large increase in the expense for these two classifications which were heretofore claimed to have been accurately apportioned under the first example by Mr. Sturgis, although not a particle of added expense is incurred nor any apparent extra service performed. There is now, under this example, added to the gross revenue of the *intra*-state passenger traffic $1,368,745.95, which same amount should necessarily be

added to its net revenue under the *proper* apportionment of expenses and if the expenses, as heretofore apportioned by Mr. Sturgis, were taken. But, by following out this revenue theory, the expenses which had under Mr. Sturgis's example been $879,000 now become $1,418,000, and the addition to the net revenue is only $830,000 instead of $1,368,000. The interstate passenger traffic on the other hand, as no change was made in the rates, or the gross earnings remain the same as under the distribution made by Mr. Sturgis. But, by this mode of apportionment the expense is reduced in the sum of $206,000 and the net revenue enhanced in the same amount, although this classification of the traffic had no part in the production of the additional gross earnings.

Under this assumption the *intra*-state freight would have added to its earnings $1,649,000 and should likewise have the same amount added to its net earnings, if the revenue theory of apportioning expenses produced the proper result, but there is added only $1,002,000 to the net earnings; the interstate freight, although it did not contribute in any manner to the added gross earnings, by this method, had its expense reduced $835,000 and the same amount added to its net income.

The miscellaneous earnings by this same theory, under this last example, had its expense reduced $145,000 and its net income increased in like amount.

Sturgis' Final Exhibit 42, with ratios of earnings applied to the Operating Expenses showing net income thereunder.

	Ratios Per Cent	Gross Revenue	Operating Expense	Net Income
Miscellaneous—				
Intra	4.40	$553,582.75	$355,467.53	$198,115.22
Inter	4.89	615,582.26	395,053.69	220,528.57
Passenger—				
Intra	10.88	1,368,745.95	878,974.26	489,771.69
Inter	13.20	1,661,576.24	1,066,402.60	595,173.64
Freight—				
Intra	13.11	1,649,685.73	1,059,131.67	590,534.06
Inter	53.52	6,735,454.71	4,323,777.80	2,411,676.91
Total	100.00	$12,584,607.64	$8,078,807.55	$4,505,800.09
Total *Intra*	28.39	$3,571,994.43	$2,293,573.46	$1,278,420.97
Inter	71.61	9,012,613.21	5,785,234.09	3,227,379.12

In the two tables following the same gross revenues above given are used and thereto added, in the first table 50% and in the next 100%, to the *intra*-state revenue; assumed to have been earned by such increase in rates. As this would not affect the services rendered, the operating expenses, as to total, are taken as above and ratio of gross earnings for each class to total then applied, in conformity with Mr. Sturgis's revenue theory of apportioning expenses and as by him applied, with result shown.

Sturgis' Final Exhibit 42. Assuming that 50 per cent is added to intra-state freight and passenger rates. Expenses apportioned on revenue theory.

	Ratios Per Cent	Gross Revenue	Operating Expense	Net Income
Miscellaneous—				
Intra	3.92	$553,582.75	$316,689.25	$236,893.50
Inter	4.37	615,582.26	353,043.89	262,538.37
Passenger—				
Intra	14.57	2,053,118.92	1,177,082.26	876,036.66
Inter	11.79	1,661,576.24	952,491.41	709,084.83
Freight—				
Intra	17.56	2,474,498.60	1,418,638.61	1,055,859.99
Inter	47.79	6,735,454.71	3,860,862.13	2,874,592.58
Total	100.00	$14,093,813.48	$8,078,807.55	$6,015,005.93
Total *Intra*	36.05	$5,081,200.27	$2,912,410.12	$2,168,790.15
Inter	63.95	9,012,613.21	5,166,397.43	3,846,215.78

Gross Revenue Increased—Inter—none;

Intra, by addition of 50% to rates.....$1,509,205.84

By application of revenue theory in apportioning operating expenses—

Intra-state expenses are Increased..... 618,836.66

Interstate expenses are Decreased..... 618,836.66

Intra-state net income is Increased..... 890,369.18

Interstate net income is Increased, although there is no increase in gross revenue..... 618,836.66

Sturgis' Final Exhibit 49. Assuming that 100 per cent is added to intra-state freight and passenger rates. Expenses apportioned on revenue theory.

	Ratios Per Cent	Gross Revenue	Operating Expense	Net Income
Miscellaneous—				
Intra	3.55	$553,582.75	$286,797.66	$266,785.09
Inter	3.94	615,582.26	318,305.02	297,277.24
Passenger—				
Intra	17.55	2,737,491.90	1,417,830.72	1,319,661.18
Inter	10.65	1,661,576.24	860,393.01	801,183.23
Freight—				
Intra	21.13	3,299,331.46	1,707,052.04	1,592,279.42
Inter	43.18	6,735,454.71	3,488,429.10	3,247,025.61
Total	100.00	$15,603,019.32	$8,078,807.55	$7,524,211.77
Total *Intra*	42.23	$6,590,406.11	$3,411,680.42	$3,178,725.69
Inter	57.77	9,012,613.21	4,667,127.13	4,345,486.08

Gross Revenue Increased—Inter—none;

Intra, by addition of 100% to rates..... $3,018,411.68

By application of revenue theory in apportioning operating expenses—

Intra-state expenses are Increased..... 1,118,106.96

Interstate expenses are Decreased..... 1,118,106.96

Intra-state net income is Increased..... 1,900,304.72

Interstate net income is Increased, although there is no increase in gross revenue..... 1,118,106.96

There can be no question in the minds of this, or any other, court but that, as Justice Brewer well stated in *Ames v. Union Pacific R. Co.*, 64 Fed. 182, in treating of this same subject, that there is no relation between expenses and revenue and that under change of conditions as to rates "obviously, the cost of transportation would be the same, whether the companies received the prices which they did in fact receive, or the reduced rates prescribed by House Roll 33." This ought to clearly demonstrate to the court the manner in which the application of the revenue theory will, under fluctuating or differential rates or in any event where the rates are not on an absolute equality, work a hardship on one or the other in accordance with the general disparity between rates, when the expenses are apportioned on the ratio that the gross revenue of the one bears to that of the other. No other theory than the service basis or the actual cost can produce the proper result, or one that would be equitable to the public as well as to the carrier.

The illustrations made are on the assumption that there is no difference between the cost of performing the service for carrying the *intra*-state as against interstate and trans-state traffic. That there is a difference between the cost of the service must necessarily be conceded, but that the difference is such as the witnesses for the railroad company would have it appear is impossible to conceive. The testimony given on this subject, which is the principal subject of controversy in the case, is very much at variance with the facts. The testimony is, for the most part, conjecture and opinion evidence of the most speculative kind. No single witness is consistent with the exposition of his theory in regard to this, nor do any two of the witnesses touching on this subject follow in detail or in percentage the same theory, nor get close enough together so that it might be claimed that there is any

uniformity or concurrence whatever. The court would have a right to expect substantial agreement or concurrence from witnesses claiming such intimate and extensive knowledge and experience, or who should at least have intimate knowledge of the affairs regarding which they are testifying. But their testimony runs all the way from equal cost, except as to terminal cost, on some of the expense items up to two, three, six and even as high as nine times as much cost for handling of the *intra*-state as against the interstate traffic. Particularly is this so with regard to the freight. The question of extra cost on passenger service being for the most part not discussed or placed in the background by the witnesses.

As to the suggestion by Mr. Sturgis that the ton mile basis for apportionment of expenses does not make proper allowance for the difference in the classes or risks, a mere casual study of the record will disclose beyond any doubt that the differences, where they exist, are clearly and fully expressed in the rates themselves as to the classifications and risks, if such rates have any reason whatever for a basis. This, of course, applies to *intra*-state as well as interstate. As to the commodities which move under low rates in carloads, and produce, in accordance with the general experience of all railroads, from 70 to 80 per cent., and over, of the ton miles, being by far the largest percentage of the freight revenues of the company, there is very little, if any, basis in the making of rates other than competition and the desire of the road for traffic. Could any one of these railroad officials, with any hope of being believed by any one, claim that 20 tons of pianos carried in a car for a certain distance, producing a revenue of $100, whether state or interstate, would produce a greater expense for maintenance of way and structures, or equipment, or general expenses, than a car loaded with

20 tons of cement, producing a revenue of only $20, when running over the same track and under the same general conditions? Yet, these wise officials would have us believe, on the theory adopted, that the cost in the one case was five times as much as in the other, eliminating any question of extra relative cost as between state and interstate. But, if the cement should happen to be interstate and the car of pianos above referred to *intra*-state, then they would claim that after applying this expense ratio of five times, as is shown here to be produced by the application of the revenue basis, the state must be further penalized by making the cost three to nine times more than the exorbitant figure already found. What possible argument could be produced that would show, under those conditions, the *intra*-state should bear a larger percentage of the expense than the interstate on anything other than possibly the cost for terminal expenses? No flight of the imagination nor any specious argument could be produced which could possibly convince any fair-minded court that it cost more in hauling the one car than the other, for fuel, oil or water, nor that the one car should be charged with a greater percentage than the other of the wages of the engineer, fireman, conductor, brakeman or any other expense attached to the conduct of the traffic other than, as heretofore suggested, the terminal expenses covered in the station service. As a matter of fact, no demonstration is made by these wise railroad men, of pretended vast experience and great knowledge, to the effect that definitely the cost in any one case is greater than in the other. Mr. Sturgis attempts to give some of the reasons, without specifying *intra*-state, why the *local* should cost more or should be charged with a larger percentage of certain expenses than the interstate, and says (Trans. 381) that it is because of the greater damage to equipment in the yards, injuries to men in the yard service, and more wrecks caused by

local than by through trains. Further speaking of this question of wrecks he says they happen because there are more stops by the local trains, and the local trains are supposed to get out of the way of through trains. On what theory, pray, can the local business be charged with a wreck which is caused because of the fact that the local train is obliged to move out of the way of the through train? This is certainly a paradoxical argument. But, a reference to Exhibit 6 (Trans. 358) will show that the total cost to both passenger and freight traffic for loss and damage to property, freight and baggage, injuries to persons and live stock, and the clearing of wrecks, for the year 1905, was $225,000, or about 2 per cent. of the grand total of over $11,000,000 expense charged in Exhibit 1. Surely the company will not claim that because the *intra*-state is chargeable with a larger proportion of this 2 per cent. of the total expenses, in figuring on the whole it should be charged on a ratio of from three to nine times.

But these witnesses contradict themselves over and over with regard to these several matters and fail to uphold their favorite theory of apportioning the expenses on the revenue basis, thereby showing that their adherence to this theory is merely because it answers their purpose and that by this method they are enabled to show loss which it would be impossible to show under any other theory.

Mr. Sturgis testifies plainly in a number of places in the record, for instance, that "the amount of use of the property should govern" (Trans. 385), "we all know it costs more to haul two tons than one ton" (Trans. 414), and "the moment you affect the tonnage you affect it all around." (Trans. 414.) Yet, he says "ton miles did not enter into my calculation so I could not have figured it that way." (Trans. 408.)

Mr. Gray, as is shown elsewhere in this brief, condemns the theory in no uncertain terms. Mr. Willard states that "after the cars get into the train and are hauled from one point to another, I should certainly agree that the expenses incident to that particular movement might properly be divided in relation to the volume of the business." (Trans. 526.)

This clearly indicates that in his opinion no extra expense would attach anywhere excepting only in the terminal cost.

In Exhibit 41 a long list of stations is given, and attached thereto are numerals indicating, as claimed, the number of handlings required for state less than carload freight. But, here again, as in many other places in the record, a clear attempt is made to mislead, because it must certainly be known that any interstate less than carload freight, passing to any of the stations named, would necessarily be subject to the same number of handlings, under the conditions named, as any *intra*-state freight. So that, while this might in a slight degree indicate the relative express handlings of local as against through freight, it can in nowise be an indication or set forth the true relative conditions as between *intra*-state and interstate traffic. It still remains a fact, conceded throughout, that the *intra*-state business is but a very small proportion of the total.

In Exhibit 38, in this connection, it will appear that the less than carload interstate business is 45,737,143 ton miles as against only 10,849,433 ton miles *intra*-state. So that, even if Exhibit 41 sets out truly the condition of handling this less than carload freight, it must also be remembered that the interstate business, less than carload, will have to stand over 80 per cent. of the total

extra cost that might be occasioned by this manner of handling the L. C. L. business referred to.

It must also be noticed and borne in mind that throughout the testimony, with the possible exception of intimations made by Mr. Sturgis, that the treatment of difference in cost is not strictly as between the handling of interstate and *intra*-state business but as between the handling of traffic on local as against through trains. There is a wide difference between claiming an extra cost for *intra*-state over interstate and an extra cost for local as against through trains. A reasonable mind is ready to concede there is considerable difference between the last two but not necessarily as between the interstate and *intra*-state traffic, because, as is clearly shown, both classes of trains handle indiscriminately and inseparably both classes of business, so that any extra expense which might be attached to the handling of the traffic on local trains would be necessarily apportioned between the interstate and *intra*-state business in the proportion that they handle the two classes of business, but never on the theory, which it is endeavored to inject into the record, that all the *intra*-state business is handled on local trains and all the interstate business on through trains.

There are many attempts in the testimony to minimize the quantity of interstate less than carload business, in order that all the extra cost may be attached to the *intra*-state business. But that this item is not to be minimized may be readily discerned by a glance at Exhibit 37, which shows the ton miles of interstate less than carload business to have been 45,737,143, whereas the less than carload *intra*-state business for the same period was only 10,849,423 ton miles. So far as any extra cost is incurred in the handling of this class of business, it must attach to both *intra*-state and interstate in proportion to the service.

Mr. Sturgis would have the court believe that the cost of handling the *intra*-state business was from three to six times as much as the cost of handling the interstate, but when questioned as to the details he can only find a few items to which he is willing to attach the six times cost, some he claims would be from four to six, some items double, as to some items he would not know whether it would be one, two or three times, others one to two times, and a number of items he says at least twice but might go beyond three, and in every way shows his lack of definite knowledge of the subject. (Trans. 364-384.) His testimony is given as opinion and conjecture, and with a view to showing a loss on *intra*-state business at all hazards. But, he insists at all times that the apportionment of expenses under any theory must be on the revenue basis, yet he tells us plainly that:

"The amount of use of the property should govern." (Trans. 385.)

And further says:

"Certainly there is an expense connected with every ton mile of freight you haul." (Trans. 403.)

To the question:

"What difference do you assume exists between the rate per ton per mile?" (Trans. 406.)

He answered:

"I have stated right straight through that I don't know what difference exists, because I haven't the ton mile figure." (Trans. 407.)

He gives the further testimony in answer to the following:

"Q. I asked you, when you were testifying before, this question: 'In making your computations as to loss upon

local business, under your theory of computation you have assumed that the revenue derived from the handling of state freight was the same per ton per mile as the revenue derived from the handling of through freight per ton per mile?' and you answered, 'That is practically the way it works out:' Do you wish to stand by that statement, or not?"

"A. Undoubtedly, in making that reply, my opinion was that about the same ratio would apply in either case." (Trans. 407.)

And he answers further:

"A. My idea was that there was probably not any great amount of difference; otherwise, I should have answered you distinctly, yes or no."

"A. The facts of the case are, that the relations of the cost to the earnings, and the cost in relation to the ton miles, is a thing I do not know." (Trans. 407, 408.)

To the question:

"But, in your calculation by which you figured out that the loss upon doing your state business was so much, did you or didn't you assume that the average rate per ton per mile received by your company for handling the state traffic was the same as the average per ton per mile for handling interstate freight?" (Trans. 408.)

He replied:

"I did not take it into consideration." (Trans. 408.)

Here is the very foundation of the whole question before the court, and yet the principal witness of the railroad company did not take the first principles of the question into consideration, in accordance with his own testimony. He tells us that he does not know what the earnings per ton per mile were (Trans. 410), and says:

"We all know it costs more to haul two tons a mile than one ton; there is not any question about that." (Trans. 414.)

And further he says:

"The moment you affect the tonnage, you affect it all around." (Trans. 414.)

Mr. George B. Harris, president of the Chicago, Burlington & Quincy Railroad Company, says the cost for state as against interstate is three to five times as much, but he is unable to give any definite reasons why. (Trans. 537.) Nevertheless he says that the Burlington in Missouri is properly located as to traffic and that its local trade is equal to that of any of the other companies. (Trans. 540.)

Mr. Daniel Willard, second vice president of the Chicago, Burlington & Quincy Railroad Company, does not seem to agree with Mr. Sturgis as to the unit on which to base the division of expenses, but says that the train mile is the unit of cost. (Trans. 496.) He says plainly that state and interstate business is handled in like manner as to through and local trains (Trans. 504), and that the percentage of state business on through trains cannot be determined because the information has never been tabulated. (Trans. 506.) He says that on the ton mile basis it costs three times as much for state as for all other freight business (Trans. 507), but further says he has no knowledge of rates (Trans. 409) and that he has not had in mind the revenue and knows nothing about it. (Trans. 511.) His answer as to the ratio of the cost of state to interstate business (Trans. 507) is then qualified in answer to a question of the master:

"Q. There is no class of business except state and interstate?

"A. In arriving at my conclusion that it costs three times as much to do state business as all other kinds of business, I have had one other division in mind and will be glad to explain that if you will permit me.

"I have had in mind business originating out of the state and passing entirely through the state to some other point beyond. I have had in mind business originating out of the state and coming into the state. And business originating in the state and going out of the state; and business originating in the state and going to some other place in the state.

"No one has made clear my position on this yet. I will say now I shall not be able to prove mathematically that is correct, yet I do not hesitate to say, under oath, that I believe this is right. I believe to do the business of a purely state character it costs from four to six times in the state of Missouri as much as it does to do business that passes through the state altogether and does not stop in the state. I believe it probably costs twice as much to do business purely local in the state of Missouri as it does to do that which comes in or goes out. And that the sum total would be that it costs three times as much to do purely state business as it does to do all kinds of interstate business." (Trans. 511.)

"Q. Per ton per mile?

"A. Yes, sir." (Trans. 512.)

He says that he has no knowledge of the relative income, is not able to quote a rate, nor has he any idea as to the relative proportion of interstate and *intra*-state on local and through trains. (Trans. 512.) His ideas with regard to some of these matters are summed up in answer to the following question:

"Q. I can make it more clear perhaps; if the through freight trains carry interstate freight and state freight in the same proportion that the two classes of freight bear in their entirety in the state, then the expense for the conducting of the two classes of freight, so far as it relates to the two classes of freight, should be divided equally, according to volume.

"A. I am inclined to think that may be true." (Trans. 525.)

To show that his estimate of extra cost had reference more particularly to the terminals and not to all the expenses we quote his answer:

"After the cars get into the train and are hauled from one point to another, I should certainly agree that the expenses incident to that particular movement might properly be divided in relation to the volume of the business." (Trans. 526.)

In answer to a question on redirect examination, propounded by Judge Spencer, which is as follows:

"It is impossible to figure it to a mathematical certainty, the actual difference between the cost of local business and through business?"

Mr. Willard answered:

"I think so. I made that statement this morning. I think it is." (Trans. 534.)

And further:

"I think it would be very difficult in any event to figure it out, but I think it is now quite impossible as we now keep account and do business. It is not information that would be necessary for the operation of the road and it would be quite expensive I am sure." (Trans. 534.)

And in answer to the further question:

"Your testimony as to any increased expense in the doing of state as compared with interstate business, has not been made in any way with relation to revenue produced?"

He answered:

"No, sir." (Trans. 535.)

"Q. It is entirely with reference to the physical act and the expense of maintenance of plant?

"A. Yes." (Trans. 535.)

When recalled Mr. Willard says, in answer to a query as to the amount of ton miles of freight hauled on through trains as compared to local trains, that he has no information as to the aggregate or the average amount of traffic, and when asked as to the percentage that the one bore to the other said:

"It would be in the nature of a guess, but I have no hesitancy in saying that it would be more than 50 per cent and upwards; I don't know if it goes as high as that or not." (Trans. 641.)

His testimony shows clearly that he knows little about the matter, but is willing to testify to much, even by contradicting himself within one answer, and that he has never given the revenue theory any consideration whatever, nor has it ever been customary, excepting in litigation of this nature, for the railroad companies to set up any figures based on this theory.

Mr. Darius Miller, first vice president of the Chicago, Burlington & Quincy Railroad Company, in his direct examination, when asked as to whether there was any way by which extra cost of state over interstate business could be accurately determined, answered:

"It is impracticable to determine that with any degree of mathematical accuracy, just what that difference is." (Trans. 606.)

"It is so complicated. Some local business handled on through trains, and some little through business handled on local trains." (Trans. 606.)

In answer to the question:

"So after all whatever basis you take to figure it out, it would have to be an estimate, depending somewhere along the line upon the opinions of people?" (Trans. 606, 607.)

He gave the following answers:

"Yes." (Trans. 607.)

"It can be determined only by being familiar with the exact facts, and then approximately, arbitrarily, dividing expenses." (Trans. 607.)

Referring to questions as to the carrying of through business on local trains and local business on through trains, he says:

"I think they average up." (Trans. 607.)

But he does not seem to have any definite opinion of his own as to the final effect of these matters, and in answer to a question states:

"I think that their estimate of three times is very conservative." (Trans. 607.)

Referring in that answer to the estimates made by witnesses theretofore examined as to the relative cost of doing the *intra*-state business. He says that the percentage of way freight carried in trains in less than carload lots would have considerable effect in adding to the increased cost, but when asked if he had any idea as to what that percentage was he answered:

"No, sir, I have no definite figures." (Trans. 608.)

He further says he has made no computations as to the relative proportions, nor has he seen any or does he know of any having been made by the company. (Trans. 609.) He testified that data could be found whereby the relation between the various classes of freight could be accurately and definitely ascertained (Trans. 610), but that the data had not been compiled because of the expense, and in this regard gave the following testimony:

"Q. I will ask you if in looking up these figures and discussing the reasonableness or unreasonableness of the

rates in question, you have not considered the question of making an estimate of the actual tons per mile of the different kinds of freight affected by this new law?

"A. We did consider having it made up for a year, but it took so long and was so expensive, that we gave it up." (Trans. 610.)

He further said:

"We considered that we could estimate it quite accurately enough from our earnings, taking the percentage basis, and save expense." (Trans. 611.)

Thus, showing conclusively that his testimony also is built upon estimates and conjectures.

Mr. George H. Crosby, freight traffic manager of the Chicago, Burlington & Quincy Railroad Company, is then brought to the stand and promptly acknowledges that he knows little about this proportion of *intra*-state and interstate freight, saying that he had made no figures on that question and that he knows nothing about it excepting that he is familiar with the conditions surrounding traffic in Missouri. (Trans. 582.) He is asked if his general judgment is about the same as the statements made by Mr. Elliott and Mr. Harris, to which he, with alacrity, replies:

"I think the figures they gave are about right. They are in the operating part of it. I have not studied the question of cost so much because I am charged with procuring revenue to the company and if the cost advances or increases it would not change the rates." (Trans. 583.)

He might have been more brief and have said "Their testimony looks good to me." He said then:

"Our rates as we have them in effect are indicative of what we consider fair rates, considering the cost of doing the business." (Trans. 586.)

And this opinion seems to be about the result of his general knowledge of the situation. As to the question of extra cost, if there is any, or the reasonableness of the rates in question, he seems unable to give even any general information which would aid in the solution of the problem. That he knew very little about the rate situation is disclosed by his answer to the following question:

"Q. Don't you know, Mr. Crosby, as a fact in your business, as traffic manager of your system, that there has been maximum rates on nearly every commodity covered by the act of 1905, in the state of Missouri since 1875?

"A. I believe there has been such rates in effect, but whether observed by all the railroads, I don't know whether they have or not. That was during the time I had nothing to do with it." (Trans. 587.)

And further:

"I have not compared those rates as we have them in effect today with the old statute rates." (Trans. 587.)

Mr. I. G. Rawn, general manager of the Illinois Central Railroad Company, is called to testify in behalf of the railroad company, and in the early part of his testimony says:

"I am not familiar with the conditions locally or otherwise, in the operation through the state of Missouri." (Trans. 568.)

In answer to a question on direct examination this witness says:

"In my experience and the basis upon which we predicate our cost of operation, the cost of handling local freight, as we term it, in comparision with that which we term through freight, and in accordance with our statistics in the matter, we find that the direct train cost for exclusive train operation, which I shall endeavor to deal with as one item, and with other items separately—

the direct exclusive train cost, of that which we term local freight, is about three and a half times that of handling through freight. That is, I reiterate, what we term exclusive train cost, or direct train cost." (Trans. 568.)

It will be noted here that he confines the extra cost to certain items and does not cover the whole expense as was proposed by Messrs. Sturgis, Elliott, Willard and Harris. When asked if he would be willing to express an opinion as to the difference between the cost of doing purely state and interstate business, Mr. Rawn answered:

"I would not consider myself competent to give an opinion that was of any value on that, not being familiar with the state of Missouri." (Trans. 571.)

When asked the question:

"Q. And the opinion you have given is a comparative statement of what is known as the local and through business?"

He replied:

"Yes, sir, I would want it to be regarded as such and not what is purely state or interstate business." (Trans. 572.)

It will be noted that we have no opinion from him as to the difference in cost between the interstate and *intra*-state business, but only as between the traffic carried on local and through trains. Both of such classes of trains, it must also be remembered, carry all classes of traffic. This is further shown in his cross-examination, as follows:

"Q. So you are not giving any testimony as to the excess cost made necessary by reason of the local, *intra*-state freight?

"A. None whatever.

"Q. Your testimony goes entirely to what is termed local as compared with through freight?

"A. Wholly so.

"Q. And the local freight may be state or interstate freight and the through freight may be state or interstate freight?

"A. That is correct." (Trans. 578.)

In this witness we have further evidence that it is not customary with railroads generally to use the revenue basis, as is clearly shown by the following:

"Q. On your line of railroad, do you take as your basis of computing the cost of transporting freight, what is known as the tonnage system, tons per mile?

"A. I don't know that I exactly understand you, but if I do, I would say yes. Pardon me, but I will ask you to be a little more definite about that. I do not quite follow your question.

"Q. The question is whether or not you have got a system of ascertaining the number of tons per mile and basing the cost upon that system.

"A. Yes, that is correct.

"Q. Rather than upon the earnings?

"A. It resolves itself into the other, after we get through with it, but we do compute our cost upon what is called a ton mile basis.

"Q. Irrespective of the question of revenue at all?

"A. Yes." (Trans. 578.)

The only witness who made an attempt to predicate his testimony, in regard to this vital point in the case, on anything other than opinion and conjecture was Mr. Henry A. Gray, comptroller of the Northern Pacific Railroad Company, who testified in no uncertain terms that the only part of the expenses to be considered in the question of extra cost is, as he puts it, "for terminal expenses and straightaway haul." (Trans. 620.) He is the only witness who makes an attempt to defend his opinions and uphold them with any calculations. He does not

agree with the witnesses heretofore quoted as to the manner of making calculations or the basis for making them, but clearly and distinctly says that the only true unit of determining the relative of cost of doing railroad business is the *gross* ton mile. (Trans. 622.)

The attention of the court is especially directed to the answer of this witness wherein he gives reasons why certain of the expenses may be considered and others excluded. (Trans. 622.) He says that expenditures for maintenance of way and structures were not considered in his calculations because it was impossible to distribute them between freight and passenger, much less as between through and way trains, and that he omitted general expenses, as they bear no direct relation to the conduct of any particular class of traffic. (Trans. 622.) It will also be noted that he speaks here specifically of way and through trains and not as to the difference between the doing of state and interstate business, but that the relative extra cost after it has been ascertained must then be applied equally to the interstate and *intra*-state business in proportion to the volume carried on the respective classes of trains.

The court will take little if any exception to the theory that is here put forward by Mr. Gray when he attempts to show the difference in the cost for terminal handling and haul of the business in Minnesota in making his comparison between the cost of handling the way and the through freight in Missouri. (Trans. 625.) This, however, gives but little basis for determining the relative cost of the *intra*-state and interstate business. But, while the theory is reasonable, the basis and data upon which the exhibit of Mr. Gray is made and his testimony given are at fault in a number of instances. In the first example given, wherein he applies certain data to 100 cars of each class of freight and makes comparisons as be-

tween 100 cars carried in way freight trains and 100 cars carried in through freight trains (Trans. 626), he bases his calculation on the assumption in the first place that the through freight train is made up of all carload freight and contains no L. C. L. freight whatever. This is wrong both in theory and practice, as with very few exceptions all through trains will carry a certain percentage or proportion of L. C. L. freight. In his second example, being the assumed cost on way freight trains, he charges the warehouse handling on the assumption that all the freight carried in the local or way train is L. C. L. This is also wrong in both theory and practice, and it will be found that while the way train will probably carry a larger proportion of L. C. L. freight than the through train, yet it could hardly be shown that any way train moved without carload freight. The basis of his loading, as is shown (Trans. 629), is a further misconstruction or error in the basis used. In fact he takes as his basis for loading cars the business moved *out* of St. Paul, and further than that only the business moved *out* of St. Paul *on the merchandise tariffs*. This is unfair and cannot give a true demonstration of the general average of the business carried on in that or any other state or territory. It is generally well known that, taking the situation of St. Paul, or any other jobbing or distributing center situated in about like manner, the business moved out of such center will be very largely composed of less than carload business, especially if only the business moving on merchandise tariffs is considered, because the very large proportion of business moving out of such a place, as to tonnage, would be commodities not moving on said merchandise tariffs. It must also be remembered that the in-business would be much more largely composed of carload freight, and that the ratio of L. C. L. to C. L. freight *in* would be much smaller than the ratio of L. C. L. to C. L. *out*. So that in arranging

his tables on this basis, which was with the evident desire of showing a large cost for handling freight on way trains, a reasonable or just average is not reached.

As against this demonstration of only a small part, and that the most expensive on the way trains, he has taken *all* the business on the through trains (Trans. 632), considers it to be all carload freight and omits one terminal switching charge, and on this unfair business then concludes that the cost of moving the local freight out of St. Paul was for the period named 7 2-3 times as much as for the cost of moving the through freight, and when comparing the less than carload lots 11¼ times. The figures, of course, are not available nor disclosed in the testimony, which would give opportunity for correcting this testimony. So that, in placing Mr. Gray's exhibit before the court in the light which it properly should appear, in order to be more fair and in keeping with the actual practice, we are obliged to assume the proportions of less than carload to carload freight contained respectively in the through and local trains. In doing this an extremely conservative figure has been taken in each case in order that there may be no criticism, and whatever doubt there may be, is resolved in favor of the railroad company, whereas all doubt should be resolved in favor of the validity of the rates assailed and against the railroad company assailing them as unconstitutional. This is a rule that has been frequently announced and followed by this court. Using as a basis the figures contained in Mr. Gray's exhibit presented with the testimony referred to, his example should work out as follows, making, as heretofore stated, only an allowance for a small percentage of less than carload freight in the through trains and a rather lower percentage than experience would justify of carload freight in the local trains.

THROUGH TRAINS

Train movement, per Gray	$321.79
Use of engine, per Gray	180.73
Use of cars, per Gray	498.45
Terminal switching in 334 miles there would be 2 term. and 2 intermediate terminal yards 135 cars × 4 = 540 at 71.41c	385.81
80 tons l. c. l. frt. in 16 cars:	
80 × 2 = 160 tons warehouse handling, at 55.16c	88.26
Office work:	
84 cars × 2 = 168 cars, at 4.734c	7.95
80 tons l. c. l. × 2 = 160 at 4.82c	7.71
Total	$1,522.40

1660 tons × 334 miles.
627,920 ton miles = .2912c per ton per mile.

LOCAL TRAINS

Train movement, per Gray	$295.57
Use of engine, per Gray	78.55
Use of cars, per Gray	228.90
Switching, 135 × 2 = 270 cars at 71.41c	192.81
Warehouse hdlg.—50 cars at 2¾ tons = 137½ tons × 2 = 275 tons at 55.16c	151.69
Office work:	
50 cars l. c. l.—137½ tons × 2 = 275 tons at 4.82c	13.26
50 cars c. l. —50 × 2 = 100 ship. at 4.734c	4.73
Total	$1065.51

975 tons × 110 miles.
107,250 ton miles = .8909c per ton per mile.
Local cost 306% of through.
Assumed:
Through trains, 80 tons l. c. l. = 4½% of tonnage, 16% of cars l. c. l.
Local trains, 137½ tons l. c. l. = 14½% of tonnage, 50% of cars l. c. l.

This, of course, applies equally to whatever state and interstate traffic may be contained in the respective trains referred to, and in proportion as the same may be carried on the said trains. More liberal allowance is also made in the matter of loading. The loading of less than carload cars in the through trains is figured at 5 tons as against only 2¾ tons per car in the way trains, and the loading of carloads in the through trains is herein figured at 21.4 tons as against only 16¾ tons in the local trains. It must be remembered, of course, that this considers not to ex-

ceed two-thirds of the expense and that the balance of the expense must be divided on equal ton mile pro rata basis, which when so considered would reduce the relative cost of freight per ton per mile as between that carried on through and local trains to considerably less than two times the cost for local over the cost for carrying freight on through trains. But, in applying this it must also be remembered that both interstate and *intra*-state freight are carried on both classes of trains and that they should contribute to any extra cost, whatever it may finally be determined to be, in the exact proportion in which these two classes of freight are carried on the two classes of trains. That is to say, the *intra*-state carried on through trains should participate in the lower cost and that part of the interstate freight carried on local trains must participate in the higher cost of the local train.

Further than this, it is a matter too generally well known to need special argument or further demonstration that the commodities moving in carloads as distinguished from freight moving under the merchandise classifications, which latter only is considered in the example given by Mr. Gray, compose by far the largest part of the tonnage of this or any of the other railroads in the United States. That this is so on Mr. Gray's road as well as elsewhere is clearly demonstrated by his testimony as follows:

"Q. What per cent of the total ton miles done by your road in Minnesota was less than carload lots?

"A. I haven't got those figures with me. I don't know that I have them at all. I haven't them with me.

"Q. Was it a comparatively small per cent?

"A. Yes, sir. The Northern Pacific does a very large carload business." (Trans. 645.)

If this classification of freight were taken into consideration in the second example made by Mr. Gray

(Trans. 638), the proportion would be entirely changed. That is to say, there would be but a very small proportion left of the freight which would be susceptible of a charge for cost designated by Mr. Gray as "warehouse handling," and which, it will be seen in the example referred to, produces over half of the entire cost of the terminal and movement combined. So that, in this, as well as in the other matters referred to, Mr. Gray has set up an unfair example, especially in that he has assumed in his first example the entire train was composed of freight susceptible of a charge under the lowest possible cost and, in the second example used, compared with it an estimate that the train was composed entirely of freight susceptible of a charge at the maximum cost. Another factor which disturbs the fairness of the average is the fact that he took the specific records of the *scheduled* trains. These, of course, only cover a small part of the traffic of the road, a very large proportion of the business being carried on "extra" trains not "scheduled."

When examples of this kind are made, in order to have any force with the court they should at least take fair averages if it is impossible to get exact data. Nor can any example of this nature be said to be fair when it is only applied, as in this case, to a *part* of the business. To have taken in the case of the through freight, as is shown, all carloads and applied thereto throughout the lowest cost, and then take as a basis for the second example only the freight moving on merchandise tariff, and only the freight moving one way, and apply to it the maximum cost, is so unfair as to amount to positive deception.

While Mr. Gray's theory on this subject is more nearly right than that of any of the other witnesses, yet his tabulation is not entitled to any more credit, by reason of

the unfairness pointed out in the examples presented to the court. But aside from this particular part of the business, to which Mr. Gray seems to have given considerable study, the record clearly shows that he knows nothing regarding the local conditions in Missouri and absolutely condemns the theory of Mr. Sturgis for the division of expenses. Even as to his own road he is not so well informed as might be expected of a witness who is brought forward in a case of this nature. In his testimony he is asked if he knows the proportions of *intra*state to interstate freight, and he answered that he did not. (Trans. 642.) He was asked if he knew what percentage of ton miles hauled by local trains was interstate. This he likewise did not know. When asked if he knew how a car or two of merchandise leaving the city of St. Paul destined to the west end of the first division on his road would be carried, he answered:

"I don't feel competent to answer that." (Trans. 643.)

He then gave the following testimony:

"Q. That is, the local freight trains would perform services ancillary to the through freight trains, both in picking up and delivering through freight, or freight carried on through freight trains?

"A. Yes, sir. We do not start out in a rigid way and say certain trains shall be local, without regard to through freight, or *vice versa*. We operate the road as a whole, to the best interest of the whole.

"Q. The purport and significance of my question would all come down to this: that local and through freight trains are terms for designating trains; freight carried on local freight trains is not entirely freight beginning and ending in the state; and freight carried on through freight trains is not entirely interstate freight.

"A. As a general proposition, that is so.

"Q. So your testimony would not furnish a basis for calculating the percentage of state freight that was car-

ried upon through freight trains, or the percentage of interstate freight that was handled by local freight trains?

"A. No, sir, my investigations did not cover that." (Trans. 644.)

That he does not agree with Mr. Sturgis as to the method of apportioning expenses is clearly shown by the following testimony:

"Q. You have used in your calculation as to the ultimate expense, what is known as the 'ton mile,' have you?

"A. Yes, sir.

"Q. And you think it is the best and proper basis?

"A. I think the only basis.

"Q. If you had the earnings upon what would be called 'state freight,' and the earnings upon what would be called 'interstate freight'—I don't mean to use those terms synonymously with local and through freight—and had the expense of the doing of the state business, could you apportion the expense of doing the state business by getting that percentage of the entire state expenses that the earnings upon freight bore to the entire earnings?

"A. I could not.

"Q. You would have to reckon with the question of the revenue upon the two classes of freight per ton per mile?

"A. Per ton, and from day to day.

"Q. And if the revenue per ton per mile which in that classification was known as state freight, was two or three times greater than the revenue per ton per mile upon the interstate freight, that must necessarily enter into the calculation of the apportionment of the expenses?

"A. May I ask you to repeat that?

(Previous question read.)

"A. It would have nothing whatever to do with the apportionment of the expenses.

"Q. That is, if you were undertaking to divide expenses on the relation of revenue to all that classification?

"A. I wouldn't undertake it.

"Q. You think it would be a fallacious system?

"A. Yes, sir.

"Q. There is no necessary relation between the earn-

ings upon one class of freight and the earnings upon another class of freight, and the expenses of conducting the two classes of freight?

"A. None whatever.

"Q. You might as well take the percentage of men and women to expenses, so far as getting a correct result is concerned?

"A. That is right." (Trans. 644, 645.)

In speaking further on this same question, when asked if he considered the revenue received from other roads he answered:

"The question of revenue must be thrown out of doors altogether." (Trans. 648.)

He further tells us:

"It is not a question of distance, except you take the average of the haul. It is not a question of concrete cases but a question of averages." (Trans. 649.)

He also gives the further testimony:

"Q. You would determine the ton mile haul upon any particular train load or car load, by multiplying the number of tons in the train or car, by the number of miles?

"A. There is no question. It might be exceedingly unfair to apply that to any particular train load. You must take it on the average." (Trans. 651.)

"A. No, sir, I did not take rates at all. The question of revenue did not enter into my calculations." (Trans. 653.)

"Q. You were not concerned in comparing the relative cost of interstate as compared with the state business, were you?

"A. No, sir.

"Q. You confined your investigation to the cost of conducting local freight as compared with through freight, both being state business?

"A. I would answer that by saying that it is probable

that on most local trains there is some interstate business. It is also possible, if not probable, that on most through trains there might be purely local state business. These things must be considered, not according to hard and fast lines, but as to the general character of the business, and on a system of averages. If that is not done it will never be possible, either for a state commission or the Interstate Commerce Commission, or any other body, to determine as to the reasonableness of rates." (Trans. 657.)

On another point he fails to agree with Mr. Sturgis, or any other witness, as will be shown by the following:

"Q. It is contended by the railroad companies generally, that the shorter haul of freight is less profitable than the longer haul, isn't it?

"A. Yes, I think so, but not necessarily everywhere.

"Q. That less than 50 mile shipments of freight, pay no profit above operating expenses?

"A. I have never claimed that.

"Q. You do not claim that?

"A. No, sir.

"Q. You do claim, though, that it pays less profit to the company than on shipments for a longer distance, do you?

"A. I claim, but I claim only for my own company, that the great bulk of its revenue, its net earnings, accrue from the transportation of long haul business." (Trans. 660.)

Speaking of the apportionment of expenses as between two classes of business the witness says:

"Some experts whose names I do not recall * * * have stated that maintenance of plant * * * should be divided between local and through on the basis of volume of business. I presume they mean not volume of train, or volume of earnings, but volume of tons.

"I absolutely repudiate that. I say those men have not looked deeply into the question or they would never have laid down any such proposition as that; because talking of volume of business in that way, and applying it to

maintenance of way and structures, takes no account of what was spoken of as 'dead weight.' (Trans. 665.)

"Q. That comes in again on what you spoke of, 'gross tons?'

"A. Gross ton mile. If it becomes necessary to divide the maintenance of expense, the gross ton mile—while perhaps there may be little objection against it, it is the nearest to being right of any factor I know of, to be applied to a division of maintenance of way and structures." (Trans. 665.)

Speaking of the accuracy of his own test he says:

"In substance, you can put pin-pricks in any of these things, but you cannot drive a coach and four through them." (Trans. 666.)

And further speaking of the question of determining the cost he says:

"If it is a question of getting down to the cost of doing the business, the proper basis for determining the cost of doing the business—of course, it depends upon what unit you use. There are several units that have been used. For instance, the unit that used to be used by engineers and experts, in days gone by, was the ton mile. And one of the brightest engineers in this country would lose his patience with me if I controverted that today." (Trans. 676.)

"Q. And the basis of making an apportionment on gross earnings is fallacious because it leaves out of consideration the element of revenue received by the respective classes of freight?

"A. I would qualify that to this extent. If it was known that the revenue of the different classes bore a reasonable relation to each other, in forming a general opinion, it might be well enough to take that into account. But with me, I have not attempted to express an opinion—of course, I have had to use some estimates in my figures, but I have sought in making my conclusions to base them upon ascertained facts. * * *

"Q. But you would not and could not give an accurate estimate of the apportionment of these expenses between

state freight and interstate freight, unless you took into consideration the revenue received from each class of freight, could you—the rate per ton per mile, say?

"A. I would in that case have assumed that the relation between the rates for doing the local business, the merchandise business, and the rate for doing the long haul or through business, were reasonably adjusted with reference to each other.

"Q. That they sustain about the same relation to each other?

"A. Yes, sir." (Trans. 677.)

Further on this same question he says:

"A. In determining the cost of moving and handling freight, relatively, I do not think you can take the revenue that may be received on that freight into consideration; because that revenue may vary up or down. If, as I have said before, the revenue was reasonably fixed, and there was a reasonable adjustment as between the rates on the local business and the through business, then, of course, it might be proper to express an opinion as to the relative cost of doing the business." (Trans. 680, 681.)

Speaking again of his system of using the ton mile as a basis, he says:

"A. You certainly have got to take that into account, or you could never go into court and attempt to set aside the rate that might be imposed." (Trans. 682.)

"A. I would not make a scientific calculation, one I would be willing to put my name to, without the net ton mile." (Trans. 685.)

"A. I have done all my figuring on the basis of tons and ton miles, and in order to form a judgment as to the relation of cost to revenue I would want to be familiar with the revenue conditions in Missouri, to give an opinion. (Trans. 683.)

Speaking further of the question of extra expense, the witness testified as follows:

"Q. Now what figure does the shorter haul cut? As I

understand you, you say you make up for the short hauls of 25 miles, the expense of doing that increases in proportion as the revenue increases?

"A. The principal increase is that matter of terminal expense.

"Q. In the question of these short hauls?

"A. Yes sir, in short hauls and long hauls, that is the principal expense. You get your goods, load them into the car, and start your car. Now, the car is running. It does not necessarily make any difference whether you carry it a hundred miles or two hundred miles, for the running expenses per ton or per hundred pounds, until you strike a point where you have got to do some switching, or run into a terminal expense again. Of course, there may be matters of topography, if you run through a tunnel in one case or over a prairie country in another case; or there may be questions of climate or seasons; you may be running over green fields, or over a snow bank. Things of that kind may enter into it. But so far as the general question of rates is concerned, the principal things that affect it as between the long and the short haul is the question of the terminal expense." (Trans. 683, 684.)

It will be noted from the foregoing excerpts of the testimony of Mr. Gray that he not only fails to corroborate the testimony of the railroad company's principal witness, Mr. Sturgis, as to his theories and manner of reaching conclusions, but repudiates the theory as being wrong, unusual and one which could under no circumstances be used in arriving at a true solution of the problem before the court. Mr. Gray is, himself, unfair in the principal part of the testimony given by him, in that he omits factors which are essential and of the utmost importance in arriving at the cost of the terminals. He acknowledges, among other things, that he knows nothing regarding the conditions in Missouri, and that he would need to know them in order to arrive at an intelligent comparision. Testimony of this nature can be of little worth to the court in deciding cases of such grave importance, and

falls far short of conforming with requirements of courts, as is shown in numerous citations and especially in the case of *Chicago, Burlington & Q. R. Co. v. Dey*, 38 Fed. 657, wherein Mr. Justice Brewer held:

"On a bill to restrain the board from carrying into effect a schedule of rates so established on the ground that they are so low as to be ruinous to the business of the road, if the evidence as to the probability of loss is so conflicting that the effect of the rates is doubtful, and largely dependent on future developments, and only about 4 per cent of the local traffic will be affected by the reduced rate, relief will not be granted until experience has demonstrated that the rates are not compensatory."

And as was announced by Mr. Justice Moody in *Knoxville v. Knoxville Water Co.*, 212 U. S. 16:

"In the first place no injunction ought to be granted unless in a case reasonably free from doubt. We think such rule is, and will be followed by all the judges of the federal courts. * * * Judicial interference should never occur unless the case presents, clearly and beyond all doubt, such a flagrant attack upon the rights of property under the guise of regulation as to compel the court to say that the rates prescribed will necessarily have the effect to deny just compensation for private property taken for the public use.

"But it should also be remembered that the judiciary ought not to interfere with the collection of rates established under legislative sanction unless they are so plainly and palpably unreasonable as to make their enforcement equivalent to the taking of property for public use without such compensation as under all the circumstances is just both to the owner and to the public; that is, judicial interference should never occur unless the case presents, clearly and beyond all doubt, such a flagrant attack upon the rights of property under the guise of regulation as to compel the court to say that the rates prescribed will necessarily have the effect to deny just compensation for private property taken for the public use."

Mr. Howard Elliott, president of the Northern Pacific Railroad Company and formerly general manager of the Missouri lines of the Chicago, Burlington & Quincy Railroad Company, is another witness introduced in behalf of the railroad company. His testimony is inconsistent. He utterly fails to corroborate the testimony of the principal witness for the road, and in fact refuses to admit that the theory for division used can be correct. He gave the following testimony:

"Q. What, in your opinion, is the relative cost or expense of handling the two businesses?

"A. I think it is rather difficult to say exactly. I should say anywhere from three to six or seven times greater for local business as compared with through, depending on the class of the branch and the amount of business on the branch." (Trans. 427.)

It will be noted that in this answer the witness takes pains to make his comparison *not* on what is the real question at issue as between *intra*-state and interstate business but as between the business carried on local and through trains, omitting what has in this case been classified as interstate second class business entirely, and further qualifies his answer even as to this, by referring to branch trains and business thereon in such manner as to leave no question of doubt but that his assumption herein would be a comparison as between local business done on branch trains and the business done on through trains. This sort of comparison can be of no avail or use in settling the doubts of the question at issue. It might well be that the cost of doing freight business on local trains over branch roads would be from three to six or seven times as much as doing the through business on the main line, but of what avail is such comparison? The local trains run on both branch and main lines, and the local business on the branch lines is composed of a much larger percentage of interstate than *intra*-state as well as on the main line.

The witness emphasizes the fact that he does not attempt to differentiate or make comparison as between state and interstate in his answer on page 430 of the transcript, and also by the following:

"Q. I am asking you about local freight without reference to whether it originates or ends in the state, and I understand you have been giving it the same meaning?

"A. I am frank to say that I consider it local, even if it crosses the state line.

"Q. There is no misunderstanding between us. Local freight is what is handled on local freight trains. And through freight is what is handled by through freight trains, in your testimony?

"A. Yes." (Trans. 459.)

He also says that the through trains handle state freight as well as interstate freight, but that he does not know the percentage. (Trans. 431.) He repudiates the insinuation contained in other parts of the testimony that there is much waste space in the loading of trains, where he testifies:

"Q. Isn't it a fact that what helped that reputation and produced that result, was the method of carrying freight in trains loaded to their capacity?

"A. That was one of the elements.

"Q. Wasn't that something of a specialty, that you devoted yourself to when you were with the Burlington and has been since?

"A. Yes." (Trans. 435.)

"Q. In speaking of local as compared with through freight, you do not mean to characterize through freight as synonymous with less than carload business did you?

"A. Not necessarily. Part of it is less than carload.

"Q. Is any of the through business less than carload?

"A. Yes sir." (Trans. 437.)

As to rates he says:

"Q. It is true, isn't it, Mr. Elliott, that the rates upon local freight are heavier than the rates upon through freight?

"A. Yes, in a general way that is true.

"Q. That is, the company gets a larger revenue on local than on through freight?

"A. Yes sir." (Trans. 439.)

The witness says he never gave any thought as to how to make division of the expense for maintenance of property. (Trans. 446.) He then gives the following testimony:

"Q. At the time you were general manager of the Burlington system, did you entertain the idea that the expense of doing the local freight business was three to six times greater than the cost of doing the through freight business?

"A. I don't know that I ever formulated them as to percentages. I entertained the idea that the cost of doing the local freight business is very much higher than the cost of doing the through business.

"Q. Is it a fact that that opinion was entertained by your associates engaged in the operation of the road while you were with it?

"A. I don't know that I ever talked with them about it. This was not such a burning question then as it is now." (Trans. 451.)

"Q. I fear I did not make my point clear to you. It is this: You have stated that the cost of handling freight per ton per mile on local freight trains was three to six times greater than handling it on through freight trains?

"A. Yes.

"Q. I am asking you if, while you were general manager of the Burlington in Missouri you had such a proportion existing between the rates?

"A. No sir, we did not. But my policy was to try to get the local rates higher, because of that very general fact. I did not figure in my mind then what the ratio was." (Trans. 452.)

"Q. You regard it as a calamity that the Burlington has today any local business in the state of Missouri?

"A. I do not say that. I say that on quite a lot of short haul business, we do not get a new dollar for an old one." (Trans. 454.)

This necessarily would apply, it must be remembered, to any short haul interstate, as well as to short haul *intra*-state, business. There is no claim anywhere in the testimony that all the short haul business is *intra*-state, but on the contrary it is clearly shown that much of the interstate business as well, is business of short haul. This witness further testifies as follows:

"Q. And on the entire local business you lose money?
"A. On everything we do we come out ahead.
"Q. Ahead to a very considerable extent?
"A. I hope so.
"Q. That is the purpose of the management?
"A. That is what the railroads were built for." (Trans. 454.)

"Q. Isn't it true that upon some of what you would call the through business the railroad would be better off if it didn't have to do it?
"A. It may be. You have to take it all together, the good and the bad, the thick and the thin.
"Q. Don't you get more 'thin' revenue upon long hauls than you do upon short hauls?
"A. We get a lower rate per ton mile." (Trans. 454.)

"Q. Would you go so far as to say that, taking all of what you call local freight business in the state of Missouri, that the only means whereby the Burlington Railway Company can derive a profit is by considering that local business as extra business, having to maintain the plant, etc., for other business?
"A. No I would not go quite as far as that. Some of the local business must produce a profit; but I think this very short haul business, manufactured stuff from Hannibal to Canton, for example, I doubt very much if there is anything over to the railroad." (Trans. 455.)

"A. It is very difficult on a railroad to say, your local business costs so much, and your through business costs so much. You have to take the thing as a whole. No doubt we do some business on which we do not make any money, and we do some business on which we make a great deal of money. I am not willing to say that the local business is unprofitable, or only profitable as extra busi-

ness. And some through business may be that way. We may take a lot of empty cars to Billings, Montana, and rather than call them empty we might put something in them at what would be considered as a ridiculously low rate, but, taking it as a whole, it might help out." (Trans. 455.)

This clearly indicates that the opinion of the witness as to loss on local business is far from agreeing with that of Mr. Sturgis. When questioned more definitely as to his ideas of apportionment of expenses as between local and through freight business, he completely repudiates the ratio adopted by Mr. Sturgis of apportioning on the basis of the revenue, but gives his ideas of the various bases on which the various expenses should be apportioned.

As to station agents, clerks and laborers he says: "I think we should have to take each station by itself." (Trans. 468.)

As to station supplies: "I should say, I don't believe I could give an intelligent opinion about that." (Trans. 469.)

As to the proportion of terminal expenses: "It is a large proportion. I cannot say whether more or not." (Trans. 469.)

As to switchmen, flagmen and watchmen: "I should say switchmen, flagmen and watchmen would be more for the through business than for the local, because they are mostly at the large congested points. What the ratio would be I cannot tell. (Trans. 470.)

As to the item of switching: "On the number of cars. If you have ten through cars, and ten local cars, the switching would divide evenly." (Trans. 470.)

As to telegraph expenses he gave the following testimony:

"Q. A division on the basis of volume would certainly not be unfair to the through business?
"A. No." (Trans. 470.)

As to the proportion of operating expenses at terminals: "On a tonnage basis I think." (Trans. 470.) And further says that it is divided equally according to volume. (Trans. 470.)

As to conductors, brakemen and train supplies: "On a train mile basis." (Trans. 471.)

As to oiling of cars: "On the car mile basis." (Trans. 472.)

As to engine service: "On the train mile, practically." (Trans. 474.)

But he is absolutely silent as to the question of revenue when treating of the expenses, and it will be noted that on all the various items of expenditure, regarding which he was questioned fully, he had, in each instance, a theory for division which in no case included the revenue theory. He says that he has no idea as to the percentage of *intra*-state freight to the whole. (Trans. 481.) He knows that the company's interstate business is a very large amount but can give no opinion as to the amount of freight hauled by the through freight trains in the state of Missouri which is *intra*-state business. When asked as to what should be the fair percentage of operating expenses to gross earnings to a road having a good local territory, and at the same time being in a position to handle a large volume of through business, he answered he presumed about 60 per cent—60 to 65 per cent. (Trans. 482.)

Touching the question of the haul he says:

"As the hauls approach longer and longer, the rates naturally come closer and closer together." (Trans. 483.)

When questioned further as to his claim of ratio of three to six times the cost of local to through business he says:

"A. I cannot say whether it is that much or not." (Trans. 491.)

Although he disclaims that the company is losing any money and says that the figures named were extreme figures. He further says he would have to know the length of haul in order to apportion the expenses. (Trans. 488.) He tells us that he has no idea as to the average haul of the state business as compared with the average haul of interstate business in Missouri. (Trans. 490.) But, still he insists that on one theory the expense would be for local business three times and on another theory six times as great as the expense for conducting the through business. This is certainly not such testimony as the courts require in settling controversies of this nature, especially when they have told us frequently and consistently that testimony must clearly set out the confiscatory character of the rates, else a rate statute would not be disturbed by the courts.

Mr. J. S. Stuart, general manager for the Erie Railroad Company, is then called in behalf of the railroad company. He says that, from his general experience, he would say it costs from five to eight times more to do the state business than the through interstate." (Trans. 691.) He then gives the following testimony:

"Q. And your estimate of from five to eight would vary accordingly, dependent on local conditions and the value of the business?

"A. Altogether.

"Q. What would you say as to the additional cost on that second class of interstate business which I gave you, where it either originates in Missouri and goes out, or originates out and comes into Missouri?

"A. It is rather difficult to separate that from what you call 'state' business. But there is a difference in the cost. In answering your question I should say, from my experience, that it is not less than twice as great." (Trans. 691.)

Mr. Stuart here attempts to tell us that from his general experience he knows the difference in cost between doing the one and the other classes of business as being from five to eight times, state to through, and a minimum of two times second class interstate to through. He says when the question is again asked:

"No sir, I said about twice for the second class as against through, and from six to eight on the state traffic, as against through." (Trans. 693.)

But further on he says:

"I should think there would be,—not entirely. From my experience in that sort of operation, of course, I don't know anything about Missouri or what the conditions are there." (Trans. 693.)

Speaking along this same line he says:

"I cannot say how we could analyze the operation so as to indicate that there would be any difference in that, or separate it so as to make any difference in my view of the expense." (Trans. 694.)

In speaking of the attempt to make a separation as between carload freight, local and through, he says:

"I cannot get it through my mind how that could be separated and operated, so as to answer your question with any degree of intelligence, and prove my reason. (Trans. 694.)

That his hypothesis is based on entirely different conditions than obtain in Missouri is clearly shown by the following:

"Q. And the kind of trains I have referred to as carrying through traffic, would carry probably a great deal of interstate traffic, wouldn't they?

"A. Well, I don't know how they would do it, there, but from my experience, that I am talking from, the through traffic would be carload freight. And the through traffic would not be, it was not the usual practice where I come from to attach any of the state traffic to any of these through trains.

"Q. That is, trains that would run entirely through the state?

"A. Yes sir.

"Q. But it is customary to mix interstate freight and state freight in carload lots, in passing through the state?

"A. Yes sir, we do that whenever we possibly can, for the purpose of lessening the expense of operating way freights." (Trans. 695.)

This, it will be noted, is an exact contradiction of the preceding answer in which he said no such traffic would attach to those through trains. He then testified as follows:

"Q. Then the increased cost of state traffic depends largely upon the percentage of way freight to what we would call through state freight, or carload state freight, wouldn't it?

"A. Well, now, it would be unfair for me to answer that question, because of my lack of knowledge of the conditions. There are the trains run in sparsely settled territories that do not pay at all; and on certain portions of the railroad you really run at a loss. There are a lot of conditions and I would have to be familiar with the country, and the traffic, and all that, before I could answer intelligently.

"Q. The percentage of way freight that was carried in percentage to the carload freight?

"A. Yes, that would make some difference, perhaps.

"Q. Wouldn't it be the main item of difference?
"A. I presume." (Trans. 695, 696.)

"Q. Why did you make that margin, of five to eight times. Is that because of the lack of information upon which to base your estimate?
"A. No sir. It is altogether from the varying conditions that surround railroad operation. The Erie railroad has ten divisions. We have one division on which it costs us two and a half mills per ton per mile; and we have another division where it costs us six mills per ton per mile. And the road does not get as a whole quite six mills per ton per mile for all the business it does for the whole year." (Trans. 698.)

It is to be presumed that in this last answer was contained the extreme variation in cost on the Erie Railroad, which ran from two and one-half mills per ton per mile on one division up to six mills as a maximum, and the gross revenue not quite six mills per ton per mile. The conditions here seem to be so entirely different than those in Missouri that testimony of this nature can be of little assistance in enlightening the court.

Mr. Stuart says that he adopts the ton per mile system in ascertaining earnings and cost of operating, and is entirely silent on the question of division on the revenue basis. He then says:

"Q. Is it a fact, Mr. Stuart, that railroad experts, even those who testify for the railroads, differ all the way from 10 per cent increased cost of the state traffic as compared with the interstate traffic, all the way to six or seven times increased cost?
"A. I don't know. The first I heard of this question was when I sat here today. I haven't read any articles about it or talked to anybody about it." (Trans. 698.)

This ought certainly to show, to the satisfaction of the court, that the answers of this witness are based on estimates of the wildest nature, which could be called nothing more than conjectures. He reiterates:

"I don't know anything about the traffic in Missouri, whether it is great or small." (Trans. 703.)

He again contradicts the general conclusions to be derived from his testimony, as follows:

"Q. Didn't I ask you if you based your estimate on the supposition that all way freight that was delivered at way stations was state traffic, and didn't you say you did make your estimates on that basis?

"A. Yes, I made my estimate on that, but the reason I hesitate is that sometimes they carry interstate cars in the trains. But I did not take into account what you mentioned. I said it would be so difficult to separate that. You asked me questions about the percentage of one to the other, and the effect it would have on the entire cost, and I said it would be impossible for me, with my experience to separate those things with intelligence and answer that part of it.

"Q. But you did answer to those questions, that you considered all way freight in the estimate you made in answer to Mr. Hagerman's question, as state freight?

"A. Yes, sir, I did." (Trans. 706.)

Here we have Mr. Stuart assuming, in order to reach his high excess cost, that all the local trains are run for the benefit of the state business and do not carry interstate business, which is so preposterous a proposition as to need little argument. The state freight is in tonnage not to exceed 10 per cent of the whole, and these way stations referred to must have their supplies and the business must be done with them on some kind of trains. We are told over and over again that the through trains do not carry the freight which is taken up and delivered at these way stations, and now we are told that the local trains do not carry any interstate freight. Whence do these small stations get their supplies and how do they send them out? The summing up of the testimony of this witness must be to have the effect of convincing the court that he told the truth when he said he knew nothing about the business in Missouri.

In the matter of passenger business, there is an entire want of proof as to the cost of performing that service. Mr. Sturgis insists that the proper method for apportioning the expenses is on the basis of the revenue, yet it is clearly shown by his Exhibit 6 that the railroad company, itself, in keeping accounts for its own use does not adopt that system in making up statistics, nor has it ever been heretofore sanctioned by the courts or by custom. Under his theory of apportioning the expense, as will be readily seen in making reference to his exhibits, the freight expense in proportion to revenue will be the same percentage as passenger whether the rate of fare be two cents or three cents a mile. The reduction from three cents to two cents means a reduction in the gross revenue on passenger traffic of approximately 33 1-3 per cent. As Mr. Justice Brewer says, in the case of *Ames v. Union Pacific R. Co.*, 64 Fed. 182:

"Obviously, the cost of transportation would be the same whether the companies received the prices which they would in fact receive, or the reduced rates prescribed by that bill."

Yet, a reference to the railroad company's request for findings, g. (Trans. 152), being the earnings, percentages and expenses for the company for the year ending June 30, 1908, during which period the two cent passenger fare was in effect, the respective percentages of expenses to earnings for that period are given as, freight 82.88 per cent, passenger 85.60 per cent. The percentages applied by Mr. Sturgis for the year 1904 were 84 per cent and for the year 1905 were 88 per cent. If these expenses, which are claimed to be properly and accurately apportioned, were approximately 88 per cent when the passenger fares were three cents a mile, then they surely would be much greater when the revenue had been reduced to two cents. This one item alone should be conclusive proof to the court

that there is something radically wrong about the method applied in the apportionment of expenses.

Mr. Howard Elliott, president of the Northern Pacific Railroad Company and formerly general manager of the Chicago, Burlington & Quincy Railroad Company in Missouri, says that the freight trains are the better revenue producing department of the railroad. (Trans. 433.)

Further than this it has been the general opinion of all railroad men, and generally conceded, though not heretofore or herein definitely proven, that the freight traffic produces a larger per cent of net earnings than the passenger traffic, yet the application of the revenue theory for dividing expenses between the two classes of business places them on an absolutely equal footing in the final result thereby obtained, and would show the same percentage of net profit for the passenger traffic as for the freight traffic even though the rates for the passenger traffic might have been cut to the point where, without question, they would produce an enormous loss. The fact of the matter is, that as to the passenger traffic it is the local business which produces the greater profit for the railroads. It requires no special training, deep insight, or extraordinarily keen intelligence to understand what is actually the fact, which is that for the most part the *intra*-state passengers are carried on the local trains, which trains are composed of two or three light coaches, carrying say 100 passengers, as against the movement of the through trains on which by far the larger percentage of interstate passengers are carried, whose weight will average from two to six times that of the local passenger trains and whose carrying capacity is much less than that of the locals in proportion to the number of cars.

Under these conditions can any of these railroad officials attempt to maintain, with a hope of being credited, that a local train carrying principally *intra*-state passengers in

light coaches, heavily loaded, will cost from 10 to 50 per cent more to operate than an elegantly equipped through train weighing from four to six times as much and carrying probably less than half the number of passengers, most of whom are through or interstate passengers? It is preposterous to make such claims without definitely showing the reasons or basis for the claims. It is generally conceded, and a true exposition of the conditions will prove beyond a question of doubt, that the through or interstate passenger is carried for a smaller revenue, and with much larger percentage of expense, than the *intra*state passenger.

The record, however, does not disclose any figures or testimony upon which to base a definite conclusion, and there is no testimony on this point which could be dignified with the name of proof. Mr. Sturgis says that the cost is reduced with the density of traffic. (Trans. 267, 268.) Now, let us see how his exhibits agree with this testimony. Mr. Gray says that the ratio of operating expenses to earnings on his road varies at from 50 to 55 per cent, and that the Burlington would probably be nearly 10 per cent more. Mr. Howard Elliott, president of the Northern Pacific Railroad Company and formerly connected with the Burlington Railroad Company, tells us that a fair percentage of operating expenses to revenue in Missouri would be 60 to 65 per cent. (Trans. 482.) That is the general trend of the testimony throughout. Mr. Sturgis says that the operating expenses on the Burlington's entire system for the year 1904 were 65 per cent, and for the year 1905 were 64 per cent. (Trans. 348.) But Exhibit I shows that the ratio of expenses to gross earnings in Missouri for the year 1904 were 84 per cent, and for the year 1905 were 88 per cent. (Trans. 244.) This, notwithstanding that in accordance with his theory the cost should be reduced with the greater density of

traffic. He further testifies that the net earnings over operating expenses for the entire system for the year 1904 were $2,347 per mile, and that for the same year in Missouri the net earnings over operating expenses were $5,013 per mile (Trans. 266, 268), and further that about the same ratio held good for the year 1905. Mr. Fisher's testimony on this point (Trans. 754, 755), with corrections made (Trans. 834), may be summed up in the following schedule of comparisons: (Trans. 752, 753.)

Earnings in Missouri.	1904.	1905.
Gross Revenues.....	$12,891,638.78	$12,584,607.64
Operating Expenses	7,617,920.94	7,727,223.41
Net Income	$5,273,718.84	$4,857,384.23
Ratio to Gross Revenue	20.4%	17.84%
Ratio of Operating Expense	59.09%	61.4%

1904	System.	Missouri.
Gross Revenue per mile.....	$7,688.06	$12,493.00
Net Income per mile.....	2,494.39	5,110.19
1905.		
Gross Revenue per mile.....	$6,811.02	$11,021.00
Net Income per mile.....	2,551.16	4,253.41
1904.		
Freight Revenue per mile.....	$5,265.56	$7,484.94
Net Freight Earnings per mile..	2,065.23	2,787.33
1905.		
Freight Revenue per mile.....	$5,070.89	$7,342.50
Net Freight Earnings per mile..	1,954.19	3,245.87

(Trans. 754, 755 and corrections at 834. Trans. 756 difference would have been still greater in favor of Missouri if Missouri had been credited with interstate earnings on basis of rates instead of mileage.)

This should clearly demonstrate to the court that the conditions in Missouri were exceptionally favorable, and,

as said by Mr. Fisher (Trans. 755), were caused by higher rates and greater density of population and traffic. Eliminating the great discrepancies, contradictions and conjectures contained in the testimony of the various witnesses and giving attention only to this part of it alone, which should have been sufficient to challenge the integrity of the exhibits produced by the railroad company and the specious arguments contained in the manuscript speeches, introduced under the guise of exhibits, how can it be possible for the railroad company to show enormous profits on its entire system, pay all its interest on bonds faithfully and regularly, 7 per cent dividends on an enormous capitalization and have millions of surplus remaining, as it is clearly shown to have done without interruption, when on its Missouri business, under conditions more favorable than the average over the system, it attempts to show loss? Surely, with the conditions as set out in the state of Missouri, if the railroad company made such great profits, as is shown it did, it would have shown a much larger percentage of profits in proportion to its mileage in Missouri than the average for the system.

In this connection the court is admonished not to overlook the fact that in the exhibits presented by the railroad company, especially Exhibit I, purporting to show the results for the years 1904 and 1905, and the exhibit introduced in connection with the request for findings of fact (Trans. 152), the railroad company includes in its expenses set out therein, under the guise of rental a proportion of an item which is not in reality part of the operating expenses at all, as usually considered by railroads in making up accounts, but is interest on all its outstanding bonds and 7 per cent dividend on a large issue of stock. Aside from this the charge itself is very much in excess of what it should be, because again of the application of this indefensible revenue theory of apportionment in this case.

The railroad company is fortunate in having such good business in the state of Missouri, but the state of Missouri on the other hand becomes unfortunate in expenses which are apportioned to it by reason of this prosperity; in other words, because in Missouri the railroad earns a much larger revenue per mile of road than it does for the average over the system, the witness makes Missouri bear a much larger proportion of the interest on bonds and the dividends on stock. So that for the year 1904 the percentage charged to Missouri of the total, as shown by Mr. Sturgis in his testimony (Trans. 265, 297), is 20.24 per cent or $3,169,369.73, whereas the percentage of the mileage in Missouri to the system, as is testified to by Mr. Sturgis in connection with this same testimony above referred to, is between 12 and 13 per cent.

What theory of calculation or reasoning can defend a method which will produce such results except only the theory usually adopted by the railroad companies in making rates or in resisting legislative rates that they must get all the traffic will bear and, when litigating, juggle their figures in such a way that they can "catch the public both going and coming?" But this is not the full extent of the mischief committed in thus presenting these figures to the court. As above shown, a charge has already been made to the state of Missouri in these exhibits on a large bonded indebtedness and an excessive capitalization, to the extent of fully 50 per cent more than should equitably be apportioned to the state, and said amount charged in with operating expenses. By following the exhibit down, in each case it will be found that the company demanded in addition thereto that it be permitted to earn 6 per cent on an excessive value within the state of Missouri. Can anything be more bold than this? It asks for large earnings on its value, charges it up to operating expenses under a fictitious name, and then hopes that the item has been

so covered that it will not be noticed because misnamed. It demands that it be permitted to earn it over again. Under manipulations and jugglery of this nature no rates, however excessive, could ever be proven to be compensatory.

Mr. Fisher testifies that the Missouri rates on interstate freight business will run from 25 to 35 per cent higher than the Iowa or Illinois rates. (Trans. 747.) Mr. Sturgis says that the earnings on interstate freight are apportioned to Missouri on the mileage basis, and acknowledges that to use the pro rate by rate basis would result in a larger earning for this classification of freight to the state of Missouri than is shown in his exhibit (Trans. 415, 416.) He does not know the percentages, but knows they are higher.

The testimony will not support the statements made by the witnesses, which are contradictory and uncertain in each case, and which the witnesses contradict continually, that the cost for doing the *intra*-state business is so much in excess of the cost of doing the through business, as the railroad company would have the court believe. As heretofore stated, the only testimony which pretends to go into detail and give any reasons for excess cost is that of Mr. Gray, and he has, as is clearly shown, only applied the excess ratio to a few items of the expenses; other witnesses also agree with him that the excess cost should not be applied to all the expenses. It is clearly demonstrated from these facts that the cost of doing the *intra*-state business per ton per mile is but very little in excess of the cost of doing the rest of the business. As to the question of passenger traffic there is practically no testimony or demonstration presented by the railroad, but on the contrary the natural conclusion would lead any fair-minded court to see that the cost of conducting the *intra*-state passenger business is less than the cost of conducting the interstate and through business.

We think the foregoing clearly demonstrates that where it is attempted to apportion expenses between certain classifications of business carried on, on the same trains and over the same road, the revenue theory would never, under any condition, so long as the factors, which are the rates producing the revenue, remain unequal. When such factors are brought to a close relationship, as they are approximately in the passenger traffic, then after expenses are first properly apportioned to the state use, which in the testimony is not shown to have been done, and when such expenses so found are then properly and accurately apportioned as between freight and passenger business, if then the rates are equalized as between state and interstate on both the long and the short haul; and assuming there would be no fluctuation in the factors the apportionment might be made on the revenue basis without seriously disturbing the true relationship; that is to say, the result brought about under those conditions would approximate the result which would be brought about in adopting the only true method, which is to use the cost of service for finding the expense.

It is shown in the testimony that the *intra*-state rates per ton per mile, and for the same distances, will average more than double the rates for the same things interstate. The rates being more than double they will produce more than double the amount of gross revenue for the same service performed. Therefore, if the revenue basis is applied to the gross revenue in finding the proportion of expenses, it will produce double the expenses as against that portion of the revenue which was produced by said double rate, and in that way if it were found that the cost of conducting the *intra*-state freight business was double the average cost of conducting all the business, that ratio would be expressed fully in applying the revenue method for apportioning the expenses, as is easily demonstrated

by the following simple illustration, without any additional calculation for the assumed or alleged extra expense.

Assuming for a certain period a traffic of 75,000 ton miles, 25,000 ton miles of which is *intra*-state business carried at an average rate of two cents per ton per mile, and 50,000 ton miles interstate business carried at an average rate of one cent per ton per mile, and assuming further that the expense for conducting all the business was $500; now if the revenue theory is used for apportioning the expenses it will produce the following result:

Ton Miles	Rate P. T. P. M.	Gross Revenue	Per Cent	Expense
25,000	2 cents	$500	50	$250
50,000	1 cent	$500	50	$250
75,000		$1000	100	$500

The average cost in this case is shown to be two-thirds of one cent per ton per mile, but by applying, as above, the revenue theory for apportioning the expenses the apparent cost of conducting the traffic becomes one cent per ton per mile for the *intra*-state as against one-half cent per ton per mile for the interstate. Thus fully expressing the double cost alleged for the one as against the other traffic.

Now, if we take the figures as shown in Exhibit I, for the revenue of the state of Missouri for the year 1905, and the expenses as shown therein, but eliminating taxes and rentals, which do not form a legitimate part of the operating expenses, and because it is shown that the interstate revenue, being apportioned to the state on a mileage basis, was less than it would have been, had it been apportioned to the state on the revenue, in other words, the pro rate by rate basis (although here it seems because the method will not answer his purpose, Mr. Sturgis is ready to re-

pudiate the theory). Therefore we will add then to the gross revenue for the interstate freight 20 per cent, which would express the minimum addition which should be placed on it if the apportionment of interstate revenue to the state of Missouri had been on the basis of pro rate by rate or actual earnings instead of pro rate by mileage, as was done in the exhibit produced by the railroad company; then applying to these various classifications the ratio that the earnings bear to the total expenses, it will produce a result, which would come nearer the actual fact than any other calculation which has been used by the railroad, and considering the lack of testimony and the lack of records absolutely needed to reach a just conclusion on the basis of cost of service, so that if it is necessary to use the revenue theory insisted upon by the railroad company and erroneously adopted by the trial court, the showing for 1905 will be as follows:

This demonstration is based on the gross revenue and operating expenses shown in Sturgis' exhibit 1 and his "final" exhibit 42; but to express proper earnings on interstate freight, 20% is added to amount shown for that classification in exhibits named. The application of earnings ratios, without further additions, expresses a ratio of cost for conducting the *intra*-state freight traffic equal to fully twice the cost for conducting the interstate freight traffic, because of fully double rates:

Year 1905. Ex. 42. Trans. 1448.	Ratios Per Ct.	Gross Revenue	Operating Expense	Net Income
Interstate freight earnings.....$6,735,454.71				
Plus 20%..... 1,347,090.94				
Actual interstate freight earnings.....	58.02	$8,082,545.65	$4,687,324.14	$3,395,221.51
Intra-state freight earnings.....	11.84	1,649,665.73	956,530.82	693,134.91
Interstate passenger earnings.....	11.92	1,661,576.24	962,993.86	698,582.38
Intra-state passenger earnings.....	9.83	1,368,745.95	794,146.78	574,599.17
Interstate miscellaneous earnings.....	4.42	615,582.26	357,083.29	258,498.97
Intra-state miscellaneous earnings.....	3.97	553,582.75	320,728.66	232,854.09
Total gross revenue, expense and income.....	100.00	$13,931,698.58	$8,078,807.55	$5,852,891.03

The net operating profit being 42% on each of the classifications and also on the entire business of the state for the year. The net income on a proportionate value of $41,698,280.77 for the state of Missouri is for the entire business—14%, and is the same on the proportionate value for each classification.

The value of the Chicago, Burlington & Quincy Railroad system, as per its annual report for 1905, introduced but not attached to the record and therefore not available, but which is found by a reference to Poor's Manual for 1906, as designated therein, to be "cost of road and equipment" plus "investment in controlled lines" $332,105,766.15. Missouri's proportion of the mileage, as shown by the testimony of Mr. Sturgis (Trans. 285), is about 12.5 per cent, which would be $41,638,280.77.

Applying now the *intra*-state proportion of the total gross earnings in Missouri, as shown in the preceding schedule, produces a value on which the *intra*-state traffic for the state of Missouri should pay earnings of 25.64 per cent, or $10,676,065.19. The net income on the *intra*-state traffic within the state of Missouri, as shown by the preceding schedule, for the year 1905, on the basis therein used, for apportionment of expenses was $1,500,588.17, or over 14 per cent.

The most that can possibly be claimed as to the effect the legislative acts here under discussion could have had if the passenger traffic prior to the taking effect of the rates had produced fully three cents per passenger per mile, which of course it is not shown in the record that it did, and that the new rates when effective reduced it fully one-third, is that it would, under that condition, produce a loss of 33 1-3 per cent of the gross *intra*-state revenue, or $456,248.65. In Exhibit I Mr. Sturgis claims that the diminution of *intra*-state freight revenue would have been $171,122.07 if the rates prescribed by the law of 1905 had been in effect. What the diminution would have been under the law of 1907 is not shown, although the testimony would indicate it would have been a smaller amount. But taking these amounts as above given at their maximum, the loss in the gross revenue

would have been $627,370.72; herein, of course, no allowance is made for probable increase in the traffic without proportionate increase in the expenses, which would more than likely have been brought about under the stimulation of the lower rates. But, as is shown in the preceding schedule, the traffic as it stood without any of the reduced rates in effect for the year 1905, produced a net income on *intra*-state traffic of over $1,500,000, which would have permitted a diminution in the gross *intra*-state revenue of over $850,000, and would still have left a clear 6 per cent earning on the full valuation stated.

This, of course, makes no allowance for differences in cost of freight and passenger traffic, but assumes that each is in exact proportion to the revenue. That this is not so, however, is shown in the company's Exhibit 6, wherein is disclosed the manner in which it kept account of expenses as between freight and passenger traffic for its own statistical and other uses and benefit, and also in the exhibit heretofore referred to and attached to the railroad company's request for findings. (Trans. 152.)

When the net revenues produced under this apportionment are added to the proper proportion of net revenue derived from the miscellaneous business earned within the state of Missouri, which however is not disclosed, it would be found that after paying all dividends on stock, interest on bonds, taxes and any other legitimate expense, there would be still a large excess of net revenue over the average for the system and that the rates proposed in the bills could well have been enforced without causing loss to the railroad company.

It is claimed, in the schedules and exhibits presented, that with the old rates made by the railroad company there is loss in the conduct of the traffic. If the railroad knew before the instigation of this suit that the rates

were not compensatory, and that, as it claims, the cost of the *intra*-state business was so much greater than the cost of conducting the interstate business, then when no restrictions were placed upon it by statute why did not the rates made by the railroad express the difference in the cost which it claims? It is certainly not because of philanthropy, as witnesses tell us that they endeavor to make money on everything they do and get all they ca

Is it credible that the railroad company would accept and carry traffic, or maintain and support expensive traffic bureaus, and enter into strong competition for *intra*-state business if, as it would here have us believe, the cost of carriage was from three to eight times as much as for the interstate business, without at the same time having the rates in the same ratio? With the higher cost, which is claimed, applied to the carriage of the *intra*-state business and the expenses apportioned, as is demanded by Mr. Sturgis, it would be almost impossible to make a rate which would prove compensatory. This is clearly shown in the cross examination of Mr. Gray (Trans. 677) as well as in the testimony of several of the other witnesses elsewhere. With the application of these theories as to extra cost, and the division of expenses on the revenue basis, it would be necessary for the railroad company to name rates so high, to get compensation, as would compel the public to resort to the old method of transportation by ox team, in the interest of economy. Neither the ratios of cost nor the method of apportionment can in any way, by the actual facts, be substantiated or defended. The service performed in conducting the traffic is the only basis for the apportionment of expense and is the basis which will produce results setting forth the actual condition and showing the relative cost of the various classes of the business. It is the only basis which will not fluctuate with the rates, but will under all con

ditions, if applied, show the actual cost of the service performed, and when so applied in the case at bar would prove that the rates are not only compensatory, but they would admit of large reductions and still leave ample remuneration and larger net profits than this assumedly desirable through business in which, as is stated by a number of witnesses and as is especially made plain by Mr. Elliott when he says: that as the hauls approach longer and longer, the rates naturally come closer and closer together. (Trans. 483.) While it is true that the expenses per ton per mile decrease as the length of the haul increases, yet at the same time the rates or earnings decrease more rapidly and the percentage of profit invariably becomes smaller as the length of the haul increases. That the rates decrease rapidly is not only recognized by all railroad authorities, but also by the courts. Judge Amidon in his opinion in the case of *Northern Pacific R. Co. v. Keyes*, 91 Fed. 56, says:

"It is axiomatic that the rate per ton mile rapidly decreases as the length of haul increases."

The railroad company cannot complain of the basis used by the state, that is to say, the month of September, 1906, for making certain demonstrations, in view of the fact that it tells us that the very foundation for the testimony, that is to say, the "way bills" which are the "original entry" and which it is usual and customary for railroads to keep for years for use and reference and for the basis of statistics and information, had been destroyed and it was unable to produce records in September, 1906, as late as July and August of 1906. (Trans. 387.) This is a very significant matter, and in ordinary trials would doubtless have been condemned by the trial court and been sufficient cause for finding against the railroad company. But, it does not seem to have disturbed the trial court's confidence in the railroad company in this case.

But, overlooking this, the effect of using the month of September, 1906, by the state for demonstration could do little harm and would be apt to be as true a demonstration as could be found if taken for a longer period, inasmuch as the use to which it was put was for the purpose of finding the relationship and ratios as between state, interstate and through business and not the relationship of that month to a year or any other period. The month itself might have shown much smaller than one-twelfth of a year, or on the other hand it might have shown a much greater volume of business than one-twelfth of an ordinary year, and yet not disturb the ratio between the classes. In other words, when it is not clearly shown to the contrary, it may readily be assumed that if there were either increase or decrease in the volume of business that all the classifications either gained or lost in their ordinary proportions.

We will not attempt here to analyze the testimony of the witnesses for the state further than to say that the absence of the most requisite records necessarily hampered it much, and that in any event they were always at a disadvantage in that the facts which should have been freely and frankly disclosed were not all available to them. We will leave the full discussion and analysis of this to other counsel.

But, the testimony of witnesses for the railroad company, the main points of which have heretofore been analyzed, can not be accepted by this court as satisfying the rule repeatedly announced by this court that "evidence as to the confiscatory character of rates must be so clear and convincing as to remove all doubt, that it must be certain, full and persuasive, and that the burden must be taken and borne by the railroad complaining." In view of the entire lack of testimony on many of the essential points, which become in fact the very foundation for

arriving at a conclusion, and for the further reason that the testimony herein has been shown to be so uncertain, contradictory, full of inconsistencies, conjectures and guesses, without any substantiation as to details, and where on the essential points in the testimony witnesses on behalf of the railroad company differed so widely, contradicting each other in many of the essentials, and going so far even as to condemn each other's methods and the theories advanced by them, it cannot be accepted as satisfying the rules repeatedly laid down by this court.

Rate statutes, on such testimony, as has been heretofore frequently decided by the courts, will not be overturned or declared invalid and set aside or even interfered with.

In *Knoxville v. Knoxville Water Co.*, 212 U. S. 18, Justice Moody says:

"It is a delicate and dangerous function, and ought to be exercised with a keen sense of justice on the part of the regulating body, met by a frank disclosure on the part of the company to be regulated."

"The companies to be regulated will find it to their lasting interest to furnish freely the information upon which a just regulation can be based." (*Knoxville v. Knoxville Water Co.*, 212 U. S. 1.)

"In ordinary equity suits findings of the master and the court below are conclusive here unless unsupported by the evidence or made under erroneous views of law; but where the constitutionality of a legislative act is involved, this court, from the respect due to legislative authority, will not regard such findings as conclusive." (*Knoxville v. Knoxville Water Co.*, 212 U. S. 1.)

"On a bill to restrain the board from carrying into effect a schedule of rates so established on the ground that they are so low as to be ruinous to the business of the road, if the evidence as to the probability of loss is so conflicting that the effect of the rates is doubtful, and largely dependent on future developments, and only about 4 per cent of the local traffic will be affected by the

reduced rate, relief will not be granted until experience has demonstrated that the rates are not compensatory." (*Chicago, B. & Q. R. Co. v. Dey*, 38 Fed. 657.)

The gross revenue for all freight traffic in the state of Missouri for 1905 is reported as $8,385,120.44. The total gross revenue which it is alleged would have been affected by the bill was $526,532.72, or 6.2 per cent. But, if interstate revenue had been reported at its just and full amount of earnings, the proportion of total freight earnings alleged to have been affected would have been only 5.4 per cent.

"A state rate statute is to be regarded as *prima facie* valid, and the *onus* rests on the carrier to prove the contrary." (*Ex parte Young*, 209 U. S. 126.)

"Under previous decisions of the court the legislative rate is to be taken as presumptively reasonable." (*Ruggles v. Illinois*, 108 U. S. 541.)

"In approaching the consideration of a case of this kind (a rate case) we start with the presumption that the act of the legislature is valid, and upon any company seeking to challenge its validity rests the burden of proving that it infringes the constitutional guarantee of protection to property. The case must be a clear one in behalf of the railroad company or the legislation of the state must be upheld." (*Chicago, Milwaukee & St. P. Ry. Co. v. Tompkins*, 176 U. S. 173.)

"It is not to be supposed that the legislature of any state, * * * will engage in a deliberate attempt to cripple or destroy institutions of such great value to the community as the railroads, but will always act with the sincere purpose of doing justice to the owners of railroad property, as well as to other individuals. * * * And if the rates established * * * are not conclusive, they are at least *prima facie* evidence of what is reasonable and just." (*Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 395.)

"Finally it is objected that the necessary result of upholding this suit in the circuit court will be to draw to

the lower courts a great flood of litigation of this character, where one federal judge would have it in his power to enjoin proceedings by state officials to enforce the legislative acts of the state, either by criminal or civil actions. To this it may be answered, in the first place, that no injunction ought to be granted unless in a case reasonably free from doubt. We think such rule is, and will be, followed by all the judges of the federal courts." (*Ex parte Young*, 209 U. S. 123.)

"Judicial interference should never occur unless the case presents, clearly and beyond all doubt, such a flagrant attack upon the rights of property under the guise of regulation as to compel the court to say that the rates prescribed will necessarily have the effect to deny just compensation for private property taken for the public use." (*San Diego Land & Town Co. v. National City*, 174 U. S. 739.)

"In a case like this we do not feel bound to re-examine and weigh all the evidence, although we have done so, or to proceed according to our independent opinion as to what were proper rates. It is enough if we cannot say that it was impossible for a fair-minded board to come to the result which was reached." (*San Diego Land & Town Co. v. Jasper*, 189 U. S. 439.)

"The courts, in clear cases, ought not to hesitate to arrest the operation of a confiscatory law, but they ought to refrain from interfering in cases of any other kind." (*Knoxville v. Knoxville Water Co.*, 212 U. S. 18.)

"What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth." (*Smyth v. Ames*, 169 U. S. 544, 547.)

It will be noted that the matter is limited in the one sentence to the *value of the property employed*, and in the other sentence to the *value of the services rendered*.

Judge Farrington, in *Southern Pac. Co. v. Bartine*, 170 Fed. 752, states the proposition clearly when he says:

"Now it is only as to the conducting transportation that the cost is claimed to be greater for local than for general traffic. Other items of expenditure are constant. They are practically the same for all kinds of traffic."

Then he cites numerous cases in which this theory has been discussed, and closes with these words:

"No particular ratio can be established as a matter of law. The relative cost of domestic and interstate traffic must depend always upon the peculiar facts of each case. Of the freight which is shipped, carried and delivered wholly within the state, much may be transported by what is practically a through movement; that is, by fully loaded trains, taken without interruption to their destination from the starting point. And, on the other hand, much interstate freight originating out of the state may be carried by what is essentially a local movement; that is, it may be distributed by way trains at various stations after it reaches the state." (*Southern Pac. Co. v. Bartine*, 170 Fed. 753.)

In *M. K. & T. v. I. C. C.*, 164 Fed. 645, the court said:

"In approaching the consideration of a case like this the court should start with the presumption that the order is valid, and was made after a careful consideration and a correct determination of every question of fact underlying it, and it should be accorded that respect and influence which ought to attend, and does attend, the action of a legislative or administrative board. * * *

"Upon the evidence submitted we find that it tends in no inconsiderable degree to sustain some of the contentions of the railway companies upon subordinate questions of fact, and that it tends in a lesser degree to sustain other contentions, but that it is clearly wanting in that certainty, fullness, and persuasive force which ought to be, and is, essential to overcome the force of the commission's findings or determination upon which the order is based."

Mr. Justice Peckham in *Willcox v. Consolidated Gas Co.*, 212 U. S. 23, said:

"Where, as in this case, in an action brought before the rate takes effect, complainant fails to sustain the burden of clearly showing that a rate act is confiscatory, the bill should be dismissed without prejudice to the right of the complainant to bring another action after the rate goes into effect if it then proves to be confiscatory."

In *Steenerson v. Great Northern Ry. Co.*, 72 N. W. 713, it was said:

"Held under the statute, the burden was on the railway company to show what portion of the gross earnings on through business should be apportioned to Minnesota; that it failed to maintain this burden, and on the evidence, therefore, failed to prove that the rates fixed by the commissioner are confiscatory."

In *Willcox v. Consolidated Gas Co.*, 212 U. S. 54, Mr. Justice Peckham said:

"Upon a careful consideration of the case before us, we are of the opinion that the complainant has failed to sustain the burden cast upon it of showing beyond any just or fair doubt that the acts of the legislature of the state of New York are in fact confiscatory."

In *Knoxville v. Knoxville Water Co.*, 212 U. S. 16, Mr. Justice Moody said:

"In the first place no injunction ought to be granted unless in a case reasonably free from doubt. We think such rule is, and will be, followed by all the judges of the federal courts. * * * Judicial interference should never occur unless the case presents, clearly and beyond all doubt, such a flagrant attack upon the rights of property under the guise of regulation as to compel the court to say that the rates prescribed will necessarily have the effect to deny just compensation for private property taken for the public use.

"But it should also be remembered that the judiciary ought not to interfere with the collection of rates established under legislative sanction unless they are so plainly and palpably unreasonable as to make their enforcement

equivalent to the taking of property for public use without such compensation as under all the circumstances is just both to the owner and to the public; that is, judicial interference should never occur unless the case presents, clearly and beyond all doubt, such a flagrant attack upon the rights of property under the guise of regulation as to compel the court to say that the rates prescribed will necessarily have the effect to deny just compensation for private property taken for the public use."

San Diego Land & Town Co. v. National City, 174 U. S. 739; *Chicago & Grand Trunk Ry. Co. v. Wellman*, 143 U. S. 339; *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362.

The judge who wrote the opinion in the case of *Steenerson v. Great Northern Ry. Co.*, 72 N. W. 713, said:

"In my opinion, it is only when a rate is manifestly so grossly inadequate that it could not have been fixed in the exercise of an honest and intelligent judgment that the courts have any right to declare it to be confiscatory. This seems to be substantially the doctrine suggested in *Waterworks v. Schottler*, 110 U. S. 347-354, 4 Sup. Ct. 48, which so far as I can discover is the first case in which that court suggested any modification or limitation of the doctrine of the so-called 'Granger cases.' And I think it is the doctrine which the courts must finally settle down on, unless they are prepared to assume the function of themselves fixing rates."

And further, treating of the question of the reliability of the evidence, said:

"How is a judge, who is not supposed to have any of this special learning or experience, and could not take judicial notice of it if he had it, to review the decision of the commissioners, who should have it and should act upon it? It seems to us that such a judge is not fit to act in such a matter. It is not a case of the blind leading the blind, but of one who has always been deaf and blind insisting that he can see and hear better than one who

has always had his eyesight and hearing, and has always used them to the utmost advantage in ascertaining the truth in regard to the matter in question. But before a judge can act intelligently in such a matter, he must have an amount of this special knowledge and experience which it will take him years to acquire. It is not sufficient that he take his first lessons from the partisan, and perhaps perjured, experts, or so-called experts, produced by the parties at the trial. He must have a broader, clearer and surer grasp of the subject than he can get from any such unreliable lessons. We see no way of disposing of this question except to hold that on appeal from the commission the courts should, to the best of their ability, take judicial notice of all such technical learning, knowledge, and information of a general character as should be known and understood by the commission."

Not even the agreed statement of facts between witnesses of the parties will be conclusive for the court, as is clearly shown in the case of *Chicago & Grand Trunk Ry. Co. v. Wellman*, 143 U. S. 345, wherein it is held:

"Courts should be careful not to declare legislative acts unconstitutional upon agreed and general statements, and without the fullest disclosure of all material facts."

And in delivering the opinion of the court, Mr. Justice Brewer said:

"A single suggestion in this direction: It is agreed that the defendant's operating expenses for 1888 were $2,304,516.54. Of what do these operating expenses consist? Are they made up partially of extravagant salaries; fifty to one hundred thousand dollars to the president, and in like proportion to subordinate officers? Surely, before the courts are called upon to adjudge an act of the legislature fixing the maximum passenger rates for railroad companies to be unconstitutional, on the ground that its enforcement would prevent the stockholders from receiving any dividends on their investments, or the bondholders any interest on their loans, they should be fully

advised as to what is done with the receipts and earnings of the company; for if so advised, it might clearly appear that a prudent and honest management would, within the rates prescribed, secure to the bondholders their interest and to the stockholders reasonable dividends. While the protection of vested rights of property is a supreme duty of the courts, it has not come to this, that the legislative power rests subservient to the discretion of any railroad corporation which may, by exorbitant and unreasonable salaries, or in some other improper way, transfer its earnings into what it is pleased to call 'operating expenses.'

"We do not mean to insinuate aught against the actual management of the affairs of this company. The silence of the record gives us no information, and we have no knowledge outside thereof, and no suspicion of wrong. Our suggestion is only to indicate how easily courts may be misled into doing grievous wrong to the public, and how careful they should be to not declare legislative acts unconstitutional upon agreed and general statements, and without the fullest disclosure of all material facts." (*Chicago & Grand Trunk Ry. Co. v. Wellman*, 143 U. S. 345.)

To sum up the principal points to which the attention of the court has been called, an analysis of the testimony clearly shows that the earnings are not truly reported, and when there is a failure to fully report the earnings in any one class of business an apportionment of the expenses on the improper amounts so reported cannot reveal the true condition. There is no proof that the total expenses charged to Missouri are the true or actual expenses incurred in the conduct of the traffic within the state. In this connection Mr. Sturgis tells us, as follows:

"Q. Are all of the expenses of operating terminals at St. Joe and Hannibal charged to the state of Missouri?

"A. Yes, sir.

"Q. Is not a great deal of service performed by these terminals in connection with traffic that comes from or goes to points on or by way of the Burlington lines east

of the Mississippi river, upon which Missouri gets no revenue; that is, that applies to Hannibal and St. Louis, doesn't it?

"A. I believe that is a correct statement." (Trans. 722.)

We are uninformed as to what amount this would be, but the court will surely take cognizance of the fact that in consideration of the situation of both Hannibal and St. Louis, in the sense of being great gateways and terminal points, the amount of expenses charged to Missouri which should have been charged against traffic in other states, is no inconsiderable amount.

A reference to Exhibit 6, wherein are set out the items of cost and the comparison thereof with the testimony (Trans. 731), clearly proves that the charges for maintenance are much higher in Missouri than the average over the system, and the only reasonable conclusion that can be arrived at from this is that items and large amounts properly chargeable to betterments have been included in the operating expenses. This should never be. Other matters of the same nature would doubtless appear in the expenses had they been properly analyzed, or had the railroad company, as is required by the rules laid down by this court, made full and frank disclosure of the expenditures and the reasons therefor.

There is no proof that the expenses as a whole were necessary or reasonable. The only place in the evidence where any attempt was made to cover this point was in the testimony of Mr. George B. Harris, president, where he says in answer to the following:

"Q. How have you endeavored to keep your operating and general maintenance expense, on an economical basis?

"A. The first element we try to provide for is that of safety. And we do that as well as we can. That is the most important element and after that is provided for, we

endeavor, of course, to operate as economically as we can, consistent with good service, and with that element of safety we are endeavoring to provide for. I believe, on that subject, that it is more to the interest of the public and the public authorities, and the courts, to give the railroads, not any exorbitant compensation—I do not want that, I never want to see the rates put to a price that the public cannot afford to pay and make a good round profit—but I do believe it is to the very best interests of the public to give the railroad a fair rate of compensation and stimulate them in the very highest degree to continue this development of safety. Speed to a certain extent, but absolute safety for life and property. And that cannot be done on starvation rates.

"Q. The same rule applies to the prices you pay for materials, and things like that, you try to get the best you can for the service, at the least outlay of money?

"A. We try to get the best we can." (Trans. 541.)

But this testimony is as regards conditions generally and not specifically applied to Missouri. Mr. Darius Miller, first vice president, says:

"Q. So from the standpoint of volume and density of traffic, your road is probably more favorably situated than any other road in the state of Missouri, isn't it?

"A. It ought to be and it probably is." (Trans. 618.)

This, in view of the testimony of Mr. Sturgis heretofore referred to, that the cost reduces with the density of traffic, and the generally accepted and well known theory among railroad men that such is the case, is inconsistent with the attempted proof that the ratio of expense in Missouri is much greater than the average over the system, when as a matter of fact consistency with the testimony would prove to be contrary. The values placed on the railroad by the witnesses are much too high, and where spoken of in the testimony seldom agree. There is no evidence on which the court could base its final conclusion. It is unfair in the extreme that interest on bonds and dividends on stocks, as shown in Exhibit I and elsewhere in the testimony, should be charged in with operating expenses and

then demand made that the road should be permitted to earn 6 per cent, or more, on its value. This alone should raise a grave question in the minds of the court as to much of the other testimony. Where an attempt is made, as in this case, to ask twice for certain profits, is it not likely that this attempt is also again covered up in its demand for three to six times the expense on *intra*-state as against interstate business. The apportionment of expenses on the revenue basis is fundamentally wrong, as is clearly shown in the analysis of the testimony with regard to this matter, and the ratios assumed and the extra expense claimed are conjectures, mere estimates and do not constitute such proof as is usually demanded by this court. The conclusion must be that the method pursued finally results in a pure guess. In view of these facts it will be impossible for this court to agree with the findings of the trial court. In strict justice and in view of the uniform and consistent holdings of this court in cases decided by it in the past, the result must be the upholding of the legislative acts of the state of Missouri and a reversal of the judgment and findings of the trial court.

V.

The errors of the trial court, in and of themselves sufficient to demand a reversal of this cause and to which the attention of this court is particularly directed, are the following:

1. The trial court erred in rendering judgment and making findings in favor of the railroad company, in that such judgment and findings are based on evidence which is insufficient to uphold such judgment and overcome the presumption in favor of the validity of the statutes in controversy.

2. The court erred in finding that there was an agreement between the experts, or that the experts for the state acquiesced in the testimony, in part, of some of the company's witnesses.

3. The trial court erred in finding the value of the railroad property to be $53,172,907.83, as this is much in excess of the actual value, has no foundation in fact in the testimony and includes a large amount for value of franchise and other matters which should not be considered in a case of this nature.

4. The trial court erred in the assumption that the railroad company is entitled to net earnings in any event and under all conditions. Inadequacy of rates is not confiscation.

5. The trial court erred in assuming that it must adopt one or the other of methods presented, as a whole, and in finally determining upon the revenue method for apportionment of expenses, since the method is fundamentally wrong and does not have the sanction of this court.

6. The trial court erred in finding the amount of expenses charged against the Missouri traffic, in that no evidence is produced to show that they are a correct apportionment, nor is the reasonableness or necessity of many large items charged to operating expenses shown.

7. The trial court erred in adopting tables of earnings and expenses presented by the railroad company, because such tables do not truly set forth the actual conditions.

8. The trial court erred in finding that there was any excess cost for conducting the *intra*-state passenger traffic over the cost of conducting the interstate traffic, and the finding in this regard is contrary to the evidence.

9. The trial court erred in finding that the expenses of conducting the *intra*-state freight traffic was greater "by at least 50 per cent," as the evidence will not sustain such finding.

The foregoing errors will be discussed in their order:

1. The trial court erred in finding that the maximum freight rate statutes of Missouri passed in the years 1905 and 1907, and the passenger rate statute of 1907, are unreasonable or confiscatory because the evidence is not sufficient to overcome the presumption in favor of said statutes, the evidence in the record being inconsistent and not in conformity with such findings.

The revenues are clearly proven to be understated; the expenses are not shown to have been correct, reasonable or necessary; the railroad company has not made full and frank disclosure of many of the material facts; the testimony of the witnesses for the railroad company is based on conjecture and estimates of the most speculative kind and on false premises; and the evidence of various witnesses for the railroad company is contradictory on essential points.

The principal witness of the railroad company, Mr. Sturgis, contradicts himself frequently and his evidence clearly shows that most of it is based on estimates. He has no knowledge of many of the essential facts, which are the very foundation and first principle in attempting to arrive at a just conclusion in such a case.

WHAT MR. STURGIS DID NOT KNOW.

He knows nothing about rates, and says: "I don't see a rate in a year." (Trans. 333.)

He has no knowledge of the manner of handling the traffic or what percentage of business on local trains is state and interstate. (Trans. 336.)

He knows nothing about the distribution of empty cars, saying: "That is not my business at all; this is only a general supposition I am giving you." (Trans. 336.)

He knows nothing about the comparison between state and interstate rates, and reiterates that he, "Does not see one rate in a year." (Trans. 337.)

He says profit or loss on local business has nothing to do with the relation between local and through rates. (Trans. 338.)

He does not know the amount of L. C. L. freight in interstate or state freight. (Trans. 339.)

He does not know the rule with regard to the abandonment of freight trains when insufficient traffic is offered, and he does not know which is more profitable—local or interstate business. (Trans. 341.)

He does not really know anything about the manner of running freight trains. (Trans. 342.)

He says he cannot find the relationship between *intra*-state and interstate tonnage, because the railroad has not the way bills on which to do it. (Trans. 343.)

He says that some of the way bills have been destroyed. (Trans. 344.)

He does not know the average haul of local freight, nor can he ascertain it. (Trans. 350.)

He cannot tell the average ton mile haul of interstate, nor separate it from the whole. He estimates the average *intra*-state haul at between 80 and 100 miles, but says: "It is not based on actual records of movement." (Trans. 351.)

He says the local freight expense for 1905 cannot be determined. (Trans. 363.)

He has no idea and cannot even approximate the percentage of carload and less than carload freight. Nor has he any idea as to what precentage of the total *intra*-state business is less than carload. (Trans. 366.)

He knows nothing about the relationship of one to the other, nor has he any idea of the relative proportion so that they could be expressed in figures. (Trans. 367.)

He reiterates that he knows nothing about rates. (Trans. 368.)

He knows nothing as to the disparity of rates on the two kinds of traffic, but says that at an outside limit it might be double and that his basis is made without knowledge of rates. (Trans. 369.)

He says that the way bills for July and August, 1906, are not to be had, this testimony being given in September, 1906. (Trans. 387.)

In speaking of the handling of the traffic, he says he does not know the ton mile cost or whether the handling of traffic was measured by the revenue or on an imaginary or estimated ton mile basis. (Trans. 392.)

He does not know the percentage of state freight, and says the tonnage cuts no figure at all. (Trans. 394.)

He has made no calculation, nor had any made, which would show the revenue which would have been received by the company in 1904 and 1905 had the rates authorized by the board of railroad and warehouse commissioners been in effect.

He says, "I have not any idea at all, not the slightest," in speaking with reference to the interest earned by the sinking fund. (Trans. 728.)

When asked as to his judgment on the values, he says: "I really have no expert knowledge on that question." (Trans. 742.)

It is a well settled rule of this court that the complainant, in endeavoring to overturn a rate statute, must make full and frank disclosure, and that the burden of the proof is on complainant. But, in this case the railroad company has failed to do either. The lack of knowledge of the witnesses for the railroad company will not be an excuse for failure to make disclosures which are essential in the determination of this class of litigation. The rule of the court is too well known, and citations along this line have been made in other parts of this brief, to require any further reference to the decisions upon which this theory is based, most of which will be found in the latter part of section four of this brief. We cannot at this point, however, refrain from again quoting from the opinion of Mr. Justice Moody delivered in the case of *Knoxville v. Knoxville Water Co.*, 212 U. S. 2, 8, as follows:

"Federal courts should not declare an ordinance fixing rates for a public service corporation unconstitutional and suspend its operation before it goes into effect unless the rate is clearly confiscatory; and unless complainant furnishes substantial evidence to that effect, the bill should be dismissed without prejudice to a further application to the courts if the rate after going into effect is actually confiscatory."

"The constitutional invalidity should be manifest, and where that invalidity rests upon disputed questions of fact the invalidating facts must be proved to the satisfaction of the court. In view of the character of the judicial power invoked in such cases it is not tolerable that its exercise should rest securely upon the findings of a master, even though they be confirmed by the trial court. The power is best safe-guarded against abuse by preserving to this court complete freedom in dealing with the facts of

each case. Nothing less than this is demanded by the respect due from the judicial to the legislative authority. It must not be understood that the findings of a master, confirmed by the trial court, are without weight, or that they will not, as a practical question sometimes be regarded as conclusive. All that is intended to be said is, that in cases of this character this court will not fetter its discretion or judgment by any artificial rules as to the weight of the master's findings, however useful and well settled these rules may be in ordinary litigation." (*Knoxville v. Knoxville Water Co.*, 212 U. S. 8.)

And in the opinion of Mr. Justice Brewer delivered in the case of *Chicago, Milwaukee & St. P. Ry. Co. v. Tompkins*, 176 U. S. 172:

"In approaching the consideration of a case of this kind we start with the presumption that the act of the legislature is valid, and upon any company seeking to challenge its validity rests the burden of proving that it infringes the constitutional guarantee of protection to property. The case must be a clear one in behalf of the railroad company or the legislation of the state must be upheld."

2. The trial court erred in finding that it was by the state's experts conceded that the railroad company kept books accurately and honestly and that they show the facts set out in the findings of the court. The books of the company are not set out with any detail, nor placed in evidence. Only a few questions seem to have been asked, and then only on some few specific points, from which it would be impossible to come to such a conclusion as was herein reached by the trial court. The evidence of the witnesses for the state makes no such admissions as to the whole, and the witnesses for the railroad company make no claim along this line.

But, even if the court should find that there appears to be such acquiescence, owing to the grave importance of

such cases as this, the ordinary rule of acquiescence in case of findings would not control.

Mr. Justice Moody in the case of *Knoxville v. Knoxville Water Co.*, 212 U. S. 8, said in part:

"In view of the character of the judicial power invoked in such cases it is not tolerable that its exercise should rest securely upon the findings of a master, even though they be confirmed by the trial court."

Mr. Justice Brewer, in *Chicago & Grand Trunk R. Co. v. Wellman*, 143 U. S. 339, held:

"Courts should be careful not to declare legislative acts unconstitutional upon agreed and general statements, and without the fullest disclosure of all material facts."

And at page 346, in the opinion, said:

"We do not mean to insinuate aught against the actual management of the affairs of this company. The silence of the record gives us no information, and we have no knowledge outside thereof, and no suspicion of wrong. Our suggestion is only to indicate how easily courts may be misled into doing grievous wrong to the public, and how careful they should be to not declare legislative acts unconstitutional upon agreed and general statements, and without the fullest disclosure of all material facts."

In *Steenerson v. Great Northern R. Co.*, 72 N. W. 716, the judge said:

"But before a judge can act intelligently in such a matter, he must have an amount of this special knowledge and experience which it will take him years to acquire. It is not sufficient that he take his first lessons from the partisan, and perhaps perjured, experts, or so-called experts, produced by the parties at the trial. He must have a broader, clearer and surer grasp of the subject than he can get from any such unreliable lessons. We see no way of disposing of this question except to hold that on appeal

from the commission the courts should, to the best of their ability, take judicial notice of all such technical learning, knowledge, and information of a general character as should be known and understood by the commission."

3. The trial court erred in finding the value of the railroad company in Missouri to be $53,172,907.83, and further erred in finding that the value of the franchise included in the value as fixed by the state board of equalization for the state of Missouri was so small as to make no appreciable difference in the result.

The court also erred in finding that the railroad was entitled to earn a return on the value of the franchise. The evidence does not support the finding of the value named, and the value of the franchise is shown to be a substantial part of the total value. In Exhibit 34 (Trans. 1413) the value is by Mr. Sturgis taken at $44,334,759.69, and this same witness in Exhibit 43 (Trans. 1455) gives a detail of the amounts making up the values, and the values therein shown amount to $34,523,273.25. There is other evidence in the record which shows still different figures, but none of them seem to be based on such foundation as would give any real basis for the finding. The value of the whole road is not disclosed directly in the record, but is shown in the annual report of the company which was introduced but not made a part of the record. The stock and bond value of the whole system, as shown by said annual report and which may be found in Poor's Manual for 1906, is shown to be about $280,000,000 and the "cost of roadway and equipment" $327,000,000.

In the testimony of Mr. Sturgis it is shown that the proportion of mileage in Missouri to the system is between 12 and 13 per cent. It is not shown that the road has as high a value in Missouri as the average value over the system, but assuming that the value of the road is the

same in Missouri as the average it would produce a value of about $41,000,000.

The court also erred in the apportionment of said value as between freight and passenger and as between *intra*-state and interstate traffic, because when, as is clearly shown in this case, the *intra*-state freight revenue is produced by rates which are at least twice as high as the interstate rates, it is not difficult to show that the use the *intra*-state business has of the road, equipment and structures would only be one-half as much per dollar revenue as the use which the interstate traffic has of that property, in view of the fact that two tons of interstate freight must be carried a mile in order to earn the same amount of money as one ton of *intra*-state freight.

Mr. Justice Brewer, in *Chicago, Milwaukee & St. P. R. Co. v. Tompkins*, 176 U. S. 176, reversed the case because of the application of the revenue theory in finding values, and shows by an example how absurd the theory becomes when thus applied, saying:

"Such a result indicates that there is something wrong in the process by which the conclusion is reached. That there was, can be made apparent by further computations, and in them we will take even numbers as more easy of comprehension. Suppose the total value of the property in South Dakota was $10,000,000, and the total receipts both from interstate and local business were $1,000,000, one half from each. Then, according to the method pursued by the trial court, the value of the property used in earning local receipts would be $5,000,000, and the per cent of receipts to value would be 10 per cent. The interstate receipts being unchanged, let the local receipts by a proposed schedule be reduced to one fifth of what they had been, so that instead of receiving $500,000 the company only received $100,000. The total receipts for interstate and local business being then $600,000, the valuation of $10,000,000, divided between the two, would

give to the property engaged in earning interstate receipts in round numbers $8,333,000, and to that engaged in earning local receipts $1,667,000. But if $1,667,000 worth of property earns $100,000 it earns six per cent. In other words, although the actual receipts from local business are only one fifth of what they were, the earning capacity is three fifths of what it was. And turning to the other side of the problem, it appears that if the value of the property engaged in interstate business is to be taken as $8,333,000, and it earned $500,000, its earning capacity was the same as that employed in local business—six per cent. So that although the rates for interstate business be undisturbed, the process by which the trial court reached its conclusion discloses the same reduction in the earning capacity of the property employed in interstate business as in that employed in local business, in which the rates are reduced."

In the case of *Wilcox v. Consolidated Gas Co.*, 212 U. S. 52, Mr. Justice Peckham said:

"The complainant also contends that the state, having taxed it upon its franchises, cannot be heard to deny their existence or their value as taxed.

"The fact that the state has taxed the company upon its franchises at a greater value than is awarded them here is not material. Those taxes, even if founded upon an erroneous valuation, were properly treated by the company as part of its operating expenses, to be paid out of its earnings before the net amount could be arrived at applicable to dividends, and, if such latter sums were not sufficient to permit the proper return on the property used by the company for the public, then the rate would be inadequate. The future assessment of the value of the franchises, it is presumed, will be much lessened if it is seen that the great profits upon which that value was based are largely reduced by legislative action. In that way the consumer will be benefited by paying a reduced sum (although indirectly) for taxes.

"We are also of opinion that it is not a case for a valuation of 'good will.' The master combined the franchise value with that of good will, and estimated the total value at $20,000,000.

"The complainant has a monopoly in fact, and a consumer must take gas from it or go without. He will resort to the 'old stand,' because he cannot get gas anywhere else. The court below excluded that item, and we concur in that action."

4. The trial court erred in its assumption that the railroad company is entitled to net earnings in any event and under all conditions. Inadequacy of rates is not confiscation, and the railroad company is not entitled as of right to earn certain fixed percentages, nor can it be heard to complain that the rates fixed by itself do not produce earnings. A full disclosure by the railroad, as is required by the court in cases of this nature, would undoubtedly disclose the fact that much of the company's interstate business is carried on at an actual loss, which, however, because of its manner of apportioning expenses and adopting the revenue theory for the finding of such expense, cannot be determined from the record. Only a full and complete showing of the cost of service, properly divided, would disclose this fact.

The court will further take cognizance of the fact that under that theory, no matter how small the rate was on interstate or through business nor how self-evident it may be that the rate mentioned was producing a large loss in the interstate business, the application of the revenue theory would, so long as the total expense did not exceed the total gross revenue, always produce the same percentage of profit for the business which was actually losing money as it would for the business which might be making excessive profits. In like manner when such basis is used for the division the railroad company might injudiciously build extensions and branch lines into unprofitable territory, which would be a great burden on the system, but by this method of accounting the burden is distributed over all the system and necessarily the most profitable and

prosperous part of its territory must stand the larger part of the burden.

In re Arkansas Railroad Rate Case, 168 Fed. 720, Judge Trieber in delivering the opinion of the court said:

"Where large railroad corporations construct extensive branch lines within a state through new and unsettled sections at great expense, principally to serve as feeders for the main line, and also to enable the roads to obtain shorter lines for interstate traffic, such railroads are not entitled to charge rates on *intra*-state traffic sufficiently high to enable them to earn a specified percentage on their investment in such lines."

In *Reagan v. Farmers' Loan & Trust Co.,* 154 U. S. 409, 412, Mr. Justice Brewer said:

"They who invest their money in railroads take the same chances that men engaged in other business do of making profit from the carrying on of their business; and, as appears from other cases submitted to us with this, some of the railroads in the state of Texas have been operated at a constant loss. But such possibilities of loss are simply the natural results of all business freely carried on against which the law is powerless to afford protection.

"It is unnecessary to decide, and we do not wish to be understood as laying down as an absolute rule, that in every case a failure to produce some profit to those who have invested their money in the building of a road is conclusive that the tariff is unjust and unreasonable. And yet justice demands that every one should receive some compensation for the use of his money or property, if it be possible without prejudice to the rights of others. There may be circumstances which would justify such a tariff; there may have been extravagance and a needless expenditure of money; there may be waste in the management of the road, enormous salaries, unjust discrimination as between individual shippers, resulting in general loss. The construction may have been at a time when material and labor were at the highest price; so that the actual cost far exceeds the present value; the road may have been unwisely built, in localities where there is not

sufficient business to sustain a road. Doubtless, too, there are many other matters affecting the rights of a community in which a road is built as well as the rights of those who have built the road."

In *Southern Pacific R. Co. v. Bartine*, 170 Fed. 767, the court said:

"It does not necessarily follow that a schedule of maximum rates fixed by law is confiscatory because it fails to yield a reasonable return on the investment, above taxes, operating expense, and interest on the indebtedness. The rates must be reasonable to the company, but they must in any event, be reasonable to the public. If a railroad is built into a new and sparsely settled territory with a view of serving a large future population and developing business, the constitution does not require the few people and the small business of the present time to pay rates which will yield an income equal to the full return to be gathered when the country is populated and business developed to the full capacity of the road."

In *Steenerson v. Great Northern R. Co.*, 72 N. W. 729, the court makes an elaborate examination of the question of income and says:

"In my opinion, it is only when a rate is manifestly so grossly inadequate that it could not have been fixed in the exercise of an honest and intelligent judgment that the courts have any right to declare it to be confiscatory."

In the case of *Central of Georgia R. Co., v. McLendon*, 157 Fed. 974, the court said:

"From the figures given from the bill, it will be seen that from the appraised value of its property in Georgia, taking that part of it applicable to domestic business, the complainant has been receiving a small return approximately two per cent, that is from both freight and passenger business, while on its passenger business, considered separately, it has been receiving a return of approximately five per cent. While two per cent is a very small return, I do not know that even this rate of itself could, if now

under review, be considered as confiscatory and justify judicial action. At least I do not know that it would as the decisions now stand. *Smyth v. Ames,* 169 U. S. 544, 546; *Covington v. Sandford,* 164 U. S. 578."

In *Chicago & Grand Trunk R. Co. v. Wellman,* 143 U. S. 343, Mr. Justice Brewer in his opinion says:

"Is the validity of a law of this nature dependent upon the opinion of two witnesses, however well qualified to testify? Must court and jury accept their opinions as a finality? Must it be declared, as matter of law, that a reduction of rates necessarily diminishes income? May it not be possible—indeed, does not all experience suggest the probability—that a reduction of rates will increase the amount of business, and, therefore, the earnings? At any rate, must the court assume that it has no such effect; and ignoring all other considerations, hold, as matter of law, that a reduction of rates necessarily diminishes the earnings?"

In *Willcox v. Consolidated Gas Co.,* 212 U. S. 20, it was held:

"Rates, when fixed by legislative authority, for public service corporations, should allow a fair return upon the reasonable value of the property at the time it is being used, but the legislative act will not be declared invalid by the courts unless the rates are so unreasonably low that their enforcement would amount to taking the property for public use without compensation. *San Diego Land and Town Co. Cases,* 174 U. S. 739; 189 U. S. 439.

"Except in very clear cases, courts should not interfere with state rate legislation before the legislation goes into effect. *Knoxville v. Water Co., ante,* p. 1."

In *Smyth v. Ames,* 169 U. S. 543, it is said in the opinion:

"In the discussion of this question the plaintiffs contended that a railroad company is entitled to exact such charges for transportation as will enable it, at all times, not only to pay operating expenses, but also to meet the

interest regularly accruing upon all its outstanding obligations, and justify a dividend upon all its stock; and that to prohibit it from maintaining rates or charges for transportation adequate to *all* those ends will deprive it of its property without due process of law, and deny to it the equal protection of the laws. * * * In our opinion, the broad proposition advanced by counsel involves some misconception of the relations between the public and a railroad corporation. * * * It cannot, therefore, be admitted that a railroad corporation maintaining a highway under the authority of the state may fix its rates with a view solely to its own interests, and ignore the rights of the public. * * * If a railroad corporation has bonded its property for an amount that exceeds its fair value, or if its capitalization is largely fictitious, it may not impose upon the public the burden of such increased rates as may be required for the purpose of realizing profits upon such excessive valuation or fictitious capitalization. * * * What was said in *Covington & Lexington Turnpike Road Co., v. Sandford*, 164 U. S. 578, 596-7, is pertinent to the question under consideration. It was there observed: 'It cannot be said that a corporation is entitled, as of right, and without reference to the interests of the public, to realize a given per cent upon its capital stock. When the question arises whether the legislature has exceeded its constitutional power in prescribing rates to be charged by a corporation controlling a public highway, stockholders are not the only persons whose rights or interests are to be considered. The rights of the public are not to be ignored. * * * The public cannot properly be subjected to unreasonable rates in order simply that stockholders may earn dividends. * * If a corporation cannot maintain such a highway and earn dividends for stockholders, it is a misfortune for it and them which the constitution does not require to be remedied by imposing unjust burdens upon the public."

5. The trial court erred in finding that "the one basis or the other as a whole must be adopted," in speaking of the theories of the railroad company and of the state. It also erred in finding that the proper method to be applied to the apportionment of expenses was the revenue theory.

It still further erred, in this same connection, in finding that the extra cost would be the same if the ton mile theory were applied.

The trial court says that another reason for adopting the revenue theory is because of its simplicity and the ease with which it may be applied, but accuracy and justice cannot and will not be sacrificed for simplicity and ease. This court will not sanction the use of simple methods for arriving at a conclusion at the expense of accuracy, no matter how laborious, intricate or complicated may be the method required to reach the true solution of the problem. This desire for simplicity on the part of the trial court has led it into grievous error.

As heretofore stated, the revenue theory, when the basic factors are not equal, can under no condition, until such factors are equalized or brought to the points where they bear the proper relationship to each other, disclose the true apportionment of expenses between one and another class of traffic where the same are conducted over the same roadway and by the same facilities generally. The application of the revenue theory for apportionment is condemned in no uncertain terms by Mr. Justice Brewer in *Chicago, Milwaukee & St. P. R. Co. v. Tompkins*, 176 U. S. 168, heretofore quoted, and the courts generally have held along this same line notwithstanding the trial court's claim to the contrary, which is either a misconception or misconstruction of the opinions heretofore rendered on this question. In the case of *Smyth v. Ames*, 169 U. S. 466, and other cases hereinbefore mentioned, the adoption of this basis was not specific or an adoption of one method as against another, but it will be found that where the basis was accepted or used it was because no other was presented to the court in order that it might choose between the one and the other.

This unconscionable revenue theory has been made the basis of considerable argument in this brief, wherein it is very clearly shown that it cannot produce the proper or equitable result when applied to cases of this nature, and there is no need of further citations or elaboration at this point.

But, even if the interpretations made by the trial court appear to be in accord with part of the opinions hereinbefore quoted (if as we think it is shown without question that the method is incorrect and unfair), there is no reason why, nor is it likely that this court will perpetuate the wrong that will be done in the adoption of such a method in the case at bar. It is not incumbent upon the trial court or necessary that it shall adopt one or the other of several theories, which the evidence clearly shows is uncertain, unfair and based for the most part upon speculation and conjecture. To do so is to repudiate the rule repeatedly announced by this court regarding the certainty of proof in such cases. Nor will this court concur in a judgment found upon such evidence. Whatever theory is adopted, no matter how complicated the calculation necessary to arrive at the truth, it must be one which will in its final result show the true relationship of the expenses to the earnings in all classes of business under consideration. This result, the revenue theory, under differential or fluctuating rates will never produce. No theory or method can prove invariably proper or accurate other than such as will truly disclose the result based on the *value of* that part of the *property employed*, and the *true value of* the *services rendered*, and that was the opinion of this court in *Smyth v. Ames*, 169 U. S. 547, wherein Mr. Justice Harlan reaches the following conclusion:

"What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is en-

titled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth."

6. The trial court erred in finding certain amounts as expenses chargeable against the *intra*-state business for the state of Missouri, as shown in the schedules and tables adopted, without finding that the expenses were reasonable or necessary.

The court erred in permitting to be included in such expenses above named a large and unreasonable proportion of the interest on bonds, dividends on stock and charges to the sinking fund, and in permitting the inclusion of these items at all and then permitting the demand for further earnings over and above such charges.

The evidence does not disclose whether the total expenses charged against the whole traffic for Missouri are proper, reasonable or necessary. As a matter of fact, the evidence does show that some of the expenses for terminals at Hannibal and St. Louis are included, the same being properly chargeable to the traffic outside of Missouri. There does not seem to have been any inquiry into this matter further than this; but this alone should be sufficient to disclose the fact that an excess amount of expenses has been charged against the traffic in Missouri. The evidence does not show that where apportionment is made on certain items of expenditures, such as traffic expenses, general expenses and maintenance of equipment (charges made generally as to the system and then apportioned in cases like this to the state), are properly apportioned or that they are a just and true proportion chargeable to the state. The evidence does not disclose the amount paid by the company to its officers for salaries, or whether such salaries were reasonable and necessary to the proper and economical management of the

business of the company, or whether the officers devoted their entire time to the business of the company. Without such proof the lack of proper earning capacity cannot be shown, no matter what method of computation or apportionment is used to disclose the amount chargeable to operating expenses.

If the state is permitted to exercise its power to control internal commerce and prevent extortion by railway companies, it is necessary to know what all the legitimate operating expenses are and that the expenses charged are in reality legitimate and necessary, including the salaries of officers. For, if no inquiry is made into the amount or necessity of salaries and many other important items of expenses, and as to the reasonableness thereof, railway companies can at will absorb all their increase of earnings, or any excess profits, at all times by merely increasing salaries, charging unnecessary and unreasonable items, or making unreasonable apportionment to operating expenses for any certain state.

The evidence and tables presented indicate clearly that the charges included in operating expenses for maintenance are per mile of road in Missouri much in excess of the average for the system. This should be a subject of inquiry, and is an indication that expenditures for betterments and permanent improvements are included within these items of expenses which do not properly belong to operating expenses, and would, in themselves, if left out, have the effect of very materially increasing the net profits of the road for the state of Missouri.

The failure of the railroad company to disclose these matters falls far short of the rule of this court, wherein it is demanded that it shall make full and frank disclosure when attacking the validity of a rate statute. In the case at bar the evidence of the carrier is fatally defective in

these respects, and, for anything appearing in the evidence to the contrary, the company even on its own method of apportionment and computation may be able to earn substantial profits and ample returns on the value of the property devoted to the business if it allows only reasonable and necessary salaries to its officers and reasonable and necessary amounts for other large items of operating expenses. With such a condition of the record the court cannot lawfully strike down a rate statute as unconstitutional without transcending the rules established by this court in cognate cases. This condition alone throws much doubt on the question at issue, and where such is the case the rate statute must be upheld. Treating on this subject, in the case of *Chicago, Burlington & Quincy R. Co. v. Dey*, 38 Fed. 664, Mr. Justice Brewer said:

"Where the effect of the rates is doubtful, with a probability that they will prove compensatory, and the amount of business to be affected thereby is comparatively small, I think the courts may well wait for the test of experience."

Treating with the subject of uncertainty of expenses and the reasonableness or necessity of salaries and expenses, Mr. Justice Brewer in the case of *Chicago & Grand Trunk R. Co. v. Wellman*, 143 U. S. 345, said:

"It is agreed that the defendant's operating expenses for 1888 were $2,404,516.54. Of what do these operating expenses consist? Are they made up partially of extravagant salaries; fifty to one hundred thousand dollars to the president, and in like proportion to subordinate officers? Surely, before the courts are called upon to adjudge an act of the legislature fixing the maximum passenger rates for railroad companies to be unconstitutional on the ground that its enforcement would prevent the stockholders from receiving any dividends on their investments, or the bondholders any interest on their loans, they should be fully advised as to what is done with the

receipts and earnings of the company; for if so advised, it might clearly appear that a prudent and honest management would, within the rates prescribed, secure to the bondholders their interest, and to the stockholders reasonable dividends."

"We do not mean to insinuate aught against the actual management of the affairs of this company. The silence of the record gives us no information and we have no knowledge outside thereof, and no suspicion of wrong. Our suggestion is only to indicate how easily courts may be misled into doing grievous wrong to the public, and how careful they should be to not declare legislative acts unconstitutional upon agreed and general statements, and *without the fullest disclosure of all material facts.*" (*Chicago & Grand Trunk R. Co. v. Wellman*, 143 U. S. 346.)

7. The trial court erred in adopting the tables of earnings and expenses presented by the railroad company, because such tables do not truly set forth the conditions as they actually exist, nor are said tables supported by competent evidence, and for the further reason that because of the difference existing in the rates of the various classes of traffic there is a fundamental error in the method of apportionment. The items set out and charged against the *intra*-state traffic for expenses are exorbitant and far in excess of the amount which the conduct of the traffic actually costs and contains large amounts not properly chargeable to operating expenses, thus concealing the fact that the net income of the railroad company for the *intra*-state business within the state of Missouri was much in excess of that shown.

The evidence clearly shows that the interstate earnings are apportioned to Missouri on the mileage basis, and it is acknowledged by the company's principal witnesses that the apportionment on the actual earnings basis would have produced a much larger amount. This court has heretofore held that such mileage basis is not the proper

method to be pursued in apportioning earnings to a state. In thus making smaller apportionment of the interstate earnings to the state of Missouri, the ratios of the various classifications to the whole are disturbed, the interstate ratio being smaller than it actually should be and the *intra*-state thus becoming a larger ratio of the total; when applying such ratios to the expenses it necessarily charges a larger percentage of expenses to the *intra*-state business than is just.

It is not shown that the expenses charged are proper as to the whole amount charged against the state. Many of the expenses included in the total charge are expenses common to the entire line or system of railroad and must be apportioned on some basis to its various component parts when it is desirable or necessary to find the actual expenses for any part. The evidence does not show how such expenses are apportioned, nor is there any proof to show that such apportionment is correct or fair. On the other hand the evidence does disclose that some expenses are included which should not be, particularly in the matter of some terminal expenses at Hannibal and St. Louis. It is not shown that the proper apportionment of maintenance expenses, particularly for equipment, is charged to the state, nor is the manner of making the apportionment set out, nor is it shown that the apportionment is reasonable, correct or fair. The evidence discloses, particularly in Exhibit 6, that the method adopted by the railroad company, for its own use for statistical and other information in dividing expenses as between passenger and freight traffic, differs from the method adopted in this case. As is shown by the evidence, certain expenses are distinctly and directly chargeable to either the freight or the passenger, and other of the expenses are apportioned as between the two classes of traffic on certain bases and ratios, and such charges and apportionment

produce a much different result than the application of the ratio of gross earnings herein adopted and erroneously approved by the trial court.

The evidence discloses that in the opinion of several of the principal witnesses for the railroad company the freight traffic produced a greater amount of profit than the passenger traffic. But, this theory and method here advanced by the railroad has the effect of showing as a final result that the percentage of net income to gross revenue is exactly alike under all conditions and would always be so regardless of rates and even if the one class of traffic should happen to be conducted at a large loss. A division between the freight and passenger traffic, and the apportionment of the expenses on the revenue theory, would show exactly the same ratio of net earnings.

The expenses as apportioned by the railroad company between interstate and *intra*-state are, as heretofore fully set out, highly improper and by reason of such division there is charged to the *intra*-state traffic an amount very much in excess of the actual cost of conducting the traffic.

8. The trial court erred in finding that expenses for conducting the passenger traffic in Missouri should be divided on the revenue theory, and that the cost of conducting the *intra*-state traffic was at least 25 per cent more than the cost of conducting the interstate passenger traffic.

The only method which can have the sanction of this court, or which can produce the true result in the division of expenses between the two classes of passenger traffic, is, after finding the true amount of expenses which should first be apportioned to the whole of the passenger traffic, to divide the expenses on the basis of the passenger miles. So long as any difference in the rates exist between the *intra*-state and interstate passenger business, a division

on the revenue basis will not show the true expense for the one or the other, as the factors which produce the gross revenue under the above conditions are not equal and the error in the final apportionment of expenses would always follow in the proportion that the rates differ, as has been truly said by Mr. Justice Brewer in *Ames v. Union Pacific R. Co.*, 64 Fed. 182:

"Obviously, the cost of transportation would be the same whether the companies received the prices which they did in fact receive, or the reduced rates prescribed by the bill."

The court erred in finding that the *intra*-state passenger traffic cost at least 25 per cent more than the interstate passenger traffic, because the evidence does not support such finding, and in fact is exactly contrary thereto, as has been heretofore in this brief fully explained. The fact is that the *intra*-state passenger traffic is carried on at a smaller ratio of expense than the interstate. Such facts are so evident and so generally well known as to need no further argument or demonstration.

9. The trial court erred in finding that the expense of conducting the *intra*-state freight business was greater by at least 50 per cent than the cost of conducting the interstate freight business, and by applying said ratio to the revenue, because the testimony will not sustain such finding. The fact is that the cost of conducting the *intra*-state freight traffic is only slightly in excess of the cost for conducting the interstate traffic when calculations are made on the true basis for finding the apportionment of expenses, and excess cost applied only to expenses affected.

The application of the revenue theory in itself, by reason of the fact, as is clearly shown in the testimony, that the *intra*-state freight rates are fully double the interstate freight rates, penalizes the *intra*-state freight business by

charging to it double the expense that is by that method of apportionment charged against the interstate business. To add then to this exorbitant cost so found 50 per cent more is unconscionable and no evidence can be found in the record which will support this theory, excepting only opinions, guesses and conjectures of the most speculative kind, as heretofore pointed out. The evidence does not disclose that any such calculation was made or any evidence given which would support the finding of the trial court that the cost was "at least 50 per cent more." No such percentage is quoted, adopted or testified to anywhere in the record, and there is no evidence in the case from which the conclusion reached by the trial court can be sustained.

The testimony at the very outset of the case, that is to say the evidence of the first witness, should have been sufficient to challenge the integrity of the figures presented by the railroad, and should have put the court on its guard and led it to a deeper investigation than it has apparently made. This clearly shows, and we have set out sufficient excerpts from the evidence in this brief to fully disclose, that the principal witnesses of the railroad company freely acknowledged that the road was better situated within the state of Missouri than the average, that the gross earnings per mile for the road within the state of Missouri were much in excess of the average over the system, and that the net earnings were fully twice as much per mile in Missouri as they were over the system generally. The witnesses tell us that they tried to conduct the traffic on an economical basis, and one of the principal witnesses boasts that his road was famed for its economical management of its freight business. It would be strange indeed if under this condition, with the road paying interest on over $170,000,000 of bonds, 7 per cent dividend on a large capitalization, large items charged to

sinking fund and renewals, and yet be able to set aside millions as surplus, it could be shown that a large part of the traffic in Missouri was conducted at a serious loss, while at the same time testifying that the operations in Missouri resulted in net profits averaging double those of the entire system per mile of road.

The trial court constantly loses sight of the relative proportion of the volume of the *intra*-state and interstate business, and attempts to assign all extra cost that is shown to have existed to the *intra*-state business. This, as has been heretofore shown, is absolutely unfair because of the fact that where there is extra cost it must be apportioned as between both *intra*-state and interstate business in proportion to the volume that is carried on the trains which produce this extra expense.

One of the main questions in this case is as to what revenue would be produced under the proposed rates, but the theory adopted by the trial court and proposed by the railroad company for the division of expenses would never disclose the actual result. Whether the rates were in fact reduced or advanced will not change the ratio of profit between the one or the other class, but would always be equal notwithstanding the one classification was reduced and the other advanced, or *vice versa*. The only true method for arriving at the cost of conducting the business must be, as is shown in the evidence of Mr. Gray, the adoption of the gross ton miles and then the application of the net ton miles and passenger miles for the division. This mode of division would always be correct as to expenses, varying only with the amount and condition of the traffic, and would always produce the exact cost, whereas the revenue method would vary with every change of rates excepting only when a change of rates was made which applied equally and in exact proportion to all *intra*-state and interstate business.

What Mr. Justice Brewer said in *Ames v. Union Pacific R. Co.*, 64 Fed. 182, applies here with equal force as it did in the preceding paragraph. Speaking of the application of the extra cost it must always be borne in mind that the extra cost can only attach to the terminals and to part of the items in conducting transportation. This is fully set out in another part of this brief and is fully discussed by Mr. Gray and other witnesses for the railroad company, and the courts have themselves recognized that the extra expenses cannot apply to all the items. In the case of *Northern Pacific R. Co. v. Keyes*, 91 Fed. 53, it is said:

"The operating expenses of a railroad consist of two principal items: (1) Cost of maintenance of plant; (2) cost of conducting transportation. The former item is constant, and can justly be divided between the different kinds of traffic in proportion to their volume. As to the second item, however, such a division cannot properly be made; for it is agreed, by all who have had occasion consider the subject, railroad commissioners as well as railroad officials, that the cost of conducting transportation is, relative to income, much higher for local business than for the general business of a road."

Finally an analysis will clearly prove beyond all question of doubt that the principal witnesses for the railroad company showed in many places a remarkable lack of knowledge of the conditions and the traffic, and of the fundamental facts necessary to know as a foundation before approaching the question of apportionment of expenses and traffic between the various classifications in attempting to prove the rates under discussion confiscatory. The evidence of these witnesses was throughout fallacious, lacking in detail and substantiation of every principal claim, contradictory as to the evidence of the witnesses, contradictory as between each other, and in fact the witnesses went so far as to repudiate the theories, methods and bases of calculation advanced by each other. The theory

and basis of calculation finally adopted by the trial court would prove *any rate* which might be made for *intra*-state freight business confiscatory and would thereby prevent state regulation and, through the interpretation given by the trial court, would, under all conditions, absolutely nullify local control. The whole theory of the trial court seems to presuppose the right of the road to receive compensation under all circumstances, and does not give proper consideration to the rights and necessities of the public. The trial court, in the interest of simplicity and ease, adopts methods which have not been and in justice cannot be sanctioned by this court. While it is, as heretofore set out, desirable to follow methods that are simple and easy of application, yet this will not be done at the expense of accuracy no matter how laborious or intricate may be the method required to unfold the truth.

The values found are not in accord with the evidence and are in excess of the actual proportionate value of the road within the state of Missouri. The road cannot be permitted, nor should the trial court have sanctioned its demand, to charge an excess proportion of interest on all its bonds, dividends on all its stock, large amounts to replacement and sinking funds into operating expenses, and then demand in addition thereto that it be permitted to earn 6 per cent on an excessive value of the road. The road cannot demand that it shall earn any stated or fixed rate of interest. Inadequacy of rates is not always confiscation. Contrary to the finding of the court, the ton mile and passenger mile basis is customary for apportioning expenses, is the railroad company's own theory, which has been customary with it for many years past, and it should not be permitted to adopt here an unusual and incorrect method of making apportionment merely because it happens to serve its purpose better than the true and usual methods.

Invoking the principles repeatedly announced and followed by this court in kindred cases, and especially the rule which requires that one seeking to strike down a rate statute, as unconstitutional, on the ground that it has the effect of taking private property for public use without just compensation, must show "beyond any just or fair doubt" the confiscatory character of such rates, it is respectfully submitted that the findings and judgment of the circuit court in this case should be set aside and reversed.

Respectfully submitted,

WILLIAM T. THOMPSON,
Attorney General of Nebraska.

LINCOLN, September 22, 1910.

IN THE

SUPREME COURT OF THE UNITED STATES.

KNOTT VS. RAILWAY COMPANIES.	Nos. 130, 134 and 672 to 705, inclusive.
SIMPSON VS. SHEPARD.	No. 599.
SIMPSON VS. KENNEDY.	No. 600.
SIMPSON VS. SHILLABER.	No. 601.

BRIEF OF AMICI CURIAE.

STATEMENT.

We file this brief as *amici curiae*, by leave of the court which was asked pursuant to the resolution of the Third Annual Conference of Governors, passed September 14, 1911.

In so far as the cases before the court may turn on the fairness of the State action involved we are not concerned. Each case stands on its own facts in this respect, and the right of the carrier is not questioned to relief against rates shown to be unreasonably low or confiscatory. But that involves State action in its relation to rights guaranteed to citizens by the Fourteenth Amendment and not State ac-

tion in regulation of commerce conducted wholly within State boundaries in its relation to Federal authority to regulate commerce among the States. We confine ourselves to the latter feature of the cases.

In view of the fullness of other briefs, we have not undertaken to cite all the decisions bearing on the subject, but have selected enough of them to show the basis of our argument.

BRIEF.

I.

When the people of the several States granted certain specified powers to the Federal Government their intention plainly was to reserve all powers not so granted. But to forestall every possible doubt the Ninth Amendment was passed, that "The enumeration in the Constitution of certain rights shall not be construed to deny or *disparage* others retained by the people;" and the Tenth, that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

So the enumeration among the rights conferred on Congress of that "to regulate commerce with foreign nations and among the several States and with the Indian tribes" did not "deny or *disparage*" the right which was reserved to the several States to regulate their own internal commerce.

The nature and origin of this right are stated in Munn vs. Illinois, 94 U. S., pp. 124, 125.

When the people of the Colonies became independent and established them as States "they changed the form, but not the substance of their government. They retained for the purposes of government all the powers of the British Parliament." "So that now the governments of the States possess all the powers of the Parliament of England except such as have been delegated to the United States or reserved by the people. The reservations by the people are shown in the prohibitions of the Constitutions."

One of these rights, exercised "in England from time immemorial and in this country from its first colonization," was to regulate ferries, common carriers, etc., by fixing "a maximum of charge to be made for services rendered," etc.

The right of the States to regulate their own commerce is, therefore, as clear and broad as that of Congress to regulate interstate commerce. There is nothing in the Constitution to indicate an intention to make the exercise of this right secondary or incidental to the regulation of interstate commerce by Congress or dependent thereon in anywise. The right conferred and the right reserved are alike absolute as to each other, and neither is relative or dependent on the other.

In McCulloch vs. Maryland, 4 Wheat., 316, 410, Chief Justice MARSHALL said: "In America the powers of sovereignty are divided between the Government of the Union and those of the States. They are each sovereign with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other."

In Gibbons vs. Ogden, 9 Wheaton, 1, 195, he said: "The enumeration (of the power of Congress to regulate interstate commerce) presupposes something not enumerated. And that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a State." "The completely internal commerce of a State, then, may be considered as reserved for the State itself."

Plainly, then, the right of the State to regulate commerce wholly within its own borders, supported as it has been by an unbroken line of later decisions of this court, must be regarded as the law of the land.

See The Daniel Ball, 10 Wall., 557, 564; Sands vs. Manistee River Imp. Co., 123 U. S., 288, 295; Allen vs. Pullman Company, 191 U. S., 171, 180, Railway vs. Larabee Company, 211 U. S., 612, 620.

The exact nature and extent of the State's control over its own internal commerce have often been defined by this court in cases where attempts were made to escape or limit it.

In Stone vs. Trust Company, 116 U. S., 307, 334, the court said: "It (the State) may, beyond all question, by the settled rule of decisions in this court, regulate freights and fares for business done exclusively within the State."

In Reagan vs. Trust Company, 154 U. S., p. 416, where the railroad was chartered by Congress, the court said: "There is nothing in the enforcement by the State of reasonable rates for transportation wholly within the State which would disable the corporation from discharging all the duties and exercising all the powers conferred by Congress. By the act of incorporation, Congress authorized the company to build its road through the State of Texas. It knew that when constructed a part of its business would be the carrying of persons and property from points within the State to other points also within the State, and that in so doing it would be engaged in a business control of which is nowhere by the Federal Constitution given to Congress. * * * Without therefore ruling at all upon any acceptance by the railroad corporation of the act of the Legislature of the State passed in 1873 in respect to it, we are of the opinion that the Texas and Pacific Railroad Company is, as to business done wholly within the State, subject to the control of the State in all matters of taxation, rates and other police regulation."

Smyth vs. Ames, 169 U. S., 466, 521, to the same effect, was also a case of a railroad chartered by Congress.

And in Atlantic Coast Line Railroad Company vs. North Carolina Corporation Commission, 206 U. S., p. 19, it was decided that: "The elementary proposition that railroads, from the public nature of the business by them carried on and the interest which the public have in their operation, are subject, as to their State business, to State regulation, which may be exerted either directly by the legislative authority or by administrative bodies endowed with power to that end, is not and could not be successfully questioned in view of the long line of authorities sustaining that doctrine."

The decision which chiefly leads to the presentation of this brief, Shepard vs. Simpson, 184 Fed., 765, holds that the exercise of this right may be enjoined by the courts because of the actual or probable effect which it may be shown by evidence to have on interstate commerce, through the operation on those engaged therein of conditions of competition, location of commercial centers and railroad lines and of what are called "business necessities."

The attempt to overthrow action by the State with respect to its own commerce by proof that it might or did affect interstate commerce is not unfamiliar in this class of cases.

In the Passenger Cases, 7 Howard, 283, 402, the court said: "A State cannot regulate foreign commerce, but it may do many things which more or less affect it."

In Sherlock vs. Alleck, 93 U. S., 199, "Legislation in a variety of ways may affect interstate commerce and persons engaged in it without constituting regulation of it within the meaning of the Constitution."

In L. & N. R. R. Co. vs. Kentucky, 183 U. S., 503, 518, the court, in dismissing the claim that the act of the State in prohibiting discriminations within its limits directly affected interstate commerce, said: "It may be that the enforcement of the State regulation forbidding discrimination in rates in the case of articles of a like kind carried for different distances over the same line may somewhat affect commerce generally, but we have frequently held that such a result is too remote and indirect to be regarded as an interference with interstate commerce; that the interference with the commercial power of the general government, to be unlawful, must be direct, and not the merely incidental effect of enforcing the police powers of a State."

See also,

Robbins v. Shelby County Taxing District, 120 U. S., 489, 493.
Sherlock v. Alling, 93 U. S., 99, 102, 103.

The decisions clearly establish:

(1) The States have authority to regulate transportation wholly within their own limits by railroads which are also engaged in interstate commerce, whether they are chartered by the State or by Congress.

(2) The exercise of this authority is not restricted because it may or does incidentally or indirectly affect interstate commerce. Otherwise the right of the State over its own internal commerce would be *"disparaged,"* in violation of the Constitution, by the grant to Congress of the right to regulate commerce among the States.

II.

In the Minnesota case above mentioned, however, the purely local rates fixed by that State were held unlawful and enjoined because the court found that because of them carriers would have to change existing interstate rates, so that the State's regulation of its own internal commerce became in effect a regulation of interstate commerce.

The reasons given are that on account of the location of cities on the borders of Minnesota and adjoining States, the railroads will be, or have been, compelled to reduce their rates between points in Minnesota and cities in other States by reason of the competition of the latter with cities in Minnesota. Thus, Superior, Wisconsin, on the border of Minnesota is practically the same distance from St. Paul as Duluth, the two, in fact, constituting one commercial center. If the rates between St. Paul and Duluth are reduced it is contended that a reduction of the rates between St. Paul and Superior is necessary and that this constitutes a direct regulation of interstate commerce.

Other examples similar in effect are set forth, and the court says (p. 779), "The cities in each pair depend upon the same carriers for substantially the same distributing and producing markets, and receive and ship the same kind of articles. Any substantial advance of rates as between the cities composing each pair, would seriously damage, if not wholly destroy, the commerce of the city given the higher rate, and would be an undue and unjust preference and advantage in fact for its neighboring city."

The propriety of a parity of rates to and from these localities has, the court says, always been recognized. "Failure * * * to maintain substantially as low rates between

Superior and points in Minnesota as between Duluth and other points in Minnesota, would seriously impair the power of the company to transact its interstate business between Superior and points in Minnesota, and would seriously depreciate the value of the company's property in Superior" (id).

The court holds that the necessities of competition compel the railroad so to reduce its rates or "suffer a substantial loss in revenue from its interstate business." It has the choice, the court says, "of submitting to that loss or suffering substantial destruction of its interstate commerce in articles covered by the order between these localities" (p. 780).

Another disastrous effect which it was held would follow from a failure of the railroads so to adjust these rates is stated as follows: (p. 791) "Such lower basis of rates within Minnesota than between Minnesota and its neighboring States, would result in the promotion of the growth and prosperity of localities in Minnesota at the expense of localities in neighboring states and the enhancement of the value of property in Minnesota, and the serious impairment of the value of property of all business men, as well as that of the carriers themselves in the neighboring states."

The fact that the rates in question relate only to purely internal commerce is answered by saying: (p. 792) "This contention, however, cannot be sustained, because, as has been demonstrated in the earlier part of this opinion, if, by their natural or necessary operation, these acts and orders have the effect substantially to burden interstate commerce, they fall under the ban of the Constitution and beyond the power of the State, whatever their terms or the

intent of their makers may have been. They say that, while the reduction of the local fares and rates may induce the companies to reduce their interstate rates and fares across the borders of the State to a parity with the local rates, this is the voluntary act of the companies not directly required by the laws and orders. There are, however, known and inexorable laws of commerce, and one of them is that transported articles will move at the lowest available rates. Reduce local fares and rates so that fares and rates in interstate commerce across the borders of the State are substantially higher than the sums of the locals over the Minnesota stations on or near the State boundaries and the companies must reduce their interstate fares and rates on that portion of their interstate commerce affected by the sums of the locals over the Minnesota borders to a substantial parity with the sums of the locals or their interstate commerce affected thereby will unavoidably become intrastate commerce, and move at the sums of the locals. There is nothing voluntary on the part of the companies in the loss or burden imposed upon them by these reductions. That they must suffer whether they reduce their interstate rates or maintain them and permit the transformation of their affected interstate commerce into intrastate commerce by rebilling and local contracts so that it can pass at the sums of the locals. The loss of the difference in revenue between that derived from their former interstate rates and that derived from the sums of the locals is a direct and unavoidable burden upon their interstate commerce imposed by the acts and orders stated which the companies may not by any device avoid."

Further (p. 797), "The reduction of local rates does not interfere with interstate rates as a matter of law, yet it may do so as a matter of fact. Whether or not general and sweeping reductions in local rates in Minnesota necessarily interfere with interstate rates and interstate commerce is in this case, as it must be in other cases, a question of fact. The facts which determine that question in this case have been set forth in this opinion at great length, because it is upon them and not upon legal inferences, that the answer to the question, whether or not the effect of the necessary operation of the acts and orders challenged is substantially to burden interstate commerce depends."

We have quoted thus fully from the opinion concerning the conditions in Minnesota and the result upon interstate rates, in order that the grounds and the full force and effect of the decision may be seen.

But conditions in the respects mentioned are not materially different in Minnesota from what they are in other States generally. Thus, Kansas City, Kansas, and Kansas City, Missouri, are one commercial center, as are East St. Louis, Illinois, and St. Louis, Missouri; Omaha, Nebraska, and Council Bluffs, Iowa; Cincinnati, Ohio, and Covington and Newport, Kentucky; and similar situations exist all over the country.

We do not overlook or disregard these conditions of competition between places located on the borders of different States, nor the relations which exist between interstate and State rates in carrying on the business of the country. We do not rest our objection to this decision on an effort to belittle the effect of the action of Minnesota on the business between the places named. But we say that if

the principle announced is to be upheld, it will undoubtedly be made to apply by a showing of similar facts in virtually every State. The vice of the decision lies not in an incorrect statement of conditions in Minnesota and adjoining States, but in its plain disregard of the provisions of the Federal Constitution, which establish the relations between the Nation and the States.

The operation of these provisions was not made to depend on geography or convenience or competition. They cannot apply in one State and not in another, according to circumstances as they may be found by the courts, because they are vital principles which constitute the very structure of our dual form of government. If inconvenience results from upholding them it is the price we pay for the various benefits which the Constitution secures to the people of the country. Commerce is important, but we do not live for trade alone and cannot afford to let our institutions be sacrificed for the sake of it.

The cases cited in the opinion in the Minnesota case (p. 770) do not raise the question in hand, because none of them involved the effect on interstate commerce of mere regulation by the State of its strictly internal commerce.

Thus, in Railway vs. Illinois, 177 U. S., 517, a statute required all trains of an interstate railroad to stop at county seats, unlike Railway vs. Ohio, 173 U. S., 285, where a law was upheld which applied only to three trains per day.

Railroad vs. Wharton, 207 U. S., 328, was also a case of making through trains stop at points within the State although their needs were adequately met by other trains.

Commission vs. Railway, 203 U. S., 335, was a like case relating to the order of a State commission.

Railway vs. Mayes, 201 U. S., 321, related to a law requiring the furnishing by an interstate railroad to State shippers of all the cars they might require, without regard to conditions or the necessities of its interstate business, which was, of course, held directly to affect interstate commerce.

Railway vs. Illinois, 118 U. S., 557, involved an act which in terms applied to shipments from points in Illinois to New York.

Hall vs. DeCuir, 95 U. S., 485, related to the treatment of white and colored passengers on an interstate steamboat while passing through Louisiana.

Railway vs. Texas, 210 U. S., 217, was a case of a tax on gross receipts, including those from interstate commerce.

Telegraph Company vs. Kansas, 216 U. S. 1, Pullman Co. vs. Kansas, *id* 56, and Ludwig vs. Telegraph Company, *id* 146, related to the requirement from foreign companies of the payment of a percentage of their entire authorized capital as a condition of doing business in the State.

And we find in the cases referred to in the opinion (p. 795) no support for the proposition to which they are cited, viz.: "For to the extent necessary completely and effectually to regulate interstate commerce the Nation, by its Congress and its courts, may affect intrastate commerce."

Thus, State Freight Tax cases, 15 Wall., 232, involved a direct tax on interstate freight.

Chy Lung vs. Freeman, 92 U. S., 275, dealt with a tax on immigrants.

Lyng vs. Michigan, 135 U. S., 161, applied to a statute requiring the payment of a tax on liquors brought into the State as a condition of their entry.

Bowman vs. Railway, 125 U. S., 465, concerned a law requiring a certificate of authority of the consignee to sell liquors before they could be brought into the State.

Railway vs. Pennsylvania, 136 U. S., 114, related to a law taxing the privilege of keeping an office in the State for the transaction of interstate commerce.

Cooper Manufacturing Company vs. Ferguson, 113 U. S., 727, involved the right of the State to prohibit contracts with foreign corporations not having offices in the State, except upon their filing certificates, etc.

Welton vs. Missouri, 91 U. S., 275; Crutcher vs. Kentucky, 141 U. S., 47; Caldwell vs. North Carolina, 187 U. S., 622, and Osborn vs. Florida, 164 U. S., 650, were all cases where licenses were required by the State for the transaction of interstate business.

In Osborn vs. Florida, 164 U. S., 650, the license was sustained because it was limited to the purely State business of a company engaged also in interstate commerce.

Pensacola Telegraph Company vs. Western Union Telegraph Company, 96 U. S., 1, related to an exclusive right which the State had attempted to give the former company as against the right granted by Congress to the latter.

Railway vs. Husen, 95 U. S., 465, involved a statute prohibiting the bringing of cattle into the State without regard to their health or condition, which was held to be a restriction on interstate commerce, not being limited to necessary inspection, etc., which the State had the right to make.

Railway vs. Hefley, 158 U. S., 98, was the case of a State statute directly interfering with a lawful order of the Interstate Commerce Commission relating to interstate commerce.

Railway vs. Eubank, 184 U. S., 27, held a provision of the Constitution of Kentucky invalid which forbade a larger charge for a short haul within the State by interstate railroads than they charged for a longer haul from points without the State. The court had already held this provision valid as applied to long and short hauls both entirely within the State (183 U. S., 503, *supra*), and the case turned chiefly on the fact that "the highest (State) court in which a decision of the case could be had" had construed and was proceeding to enforce the provision as extending also to interstate hauls directly by its own vigor (pp. 33, 41). The court said: "The vice of the provision lies in the regulation of the rates between points wholly within the State by the rates which obtain between points outside of and those which are within the State." (P. 41.) We understand this to mean that by coupling the through and local rates together the State had made a connection between them by which its action on local rates was directly transmitted to through rates, and that if the State had dealt with local rates alone and independently the result would have been different. This view seems to be emphasized by the dissenting opinion of Justices BREWER and GRAY. See also the comment on this case by the Circuit Court of Appeals, in L. & N. R. R. Co. vs. Siler at p. 201. There was no such feature in the Minnesota case.

IV.

The basis of the Minnesota case is that the regulation of interstate commerce follows from the regulation of local commerce through "an inexorable rule of trade."

This is not a novel contention in this class of cases. It was made in Ames vs. Union Pacific, 64 Fed. Rep., 172,

but Mr. Justice BREWER said: "Neither can I understand how the reduction of local rates, as a matter of law, interferes with interstate rates. It is true that the companies may for their own convenience, to secure business, or for other reasons, rearrange their interstate rates to make them conform to the local rates prescribed by the statute, but surely there is no legal compulsion. The statute of the State does not work a change in interstate rates any more than an act of Congress prescribing interstate rates would legally work a change in local rates. Railroad companies cannot plead their own convenience, or the effect of competition between themselves and other companies, in restraint of the otherwise undeniable power of the State." This case was affirmed in Smyth vs. Ames, 169 U. S., *supra*, the court saying (p. 541): "The reasonableness or unreasonableness of rates prescribed by a State for the transportation of persons and property wholly within its limits must be determined without reference to the interstate business done by the carrier or to the profits derived from it." This clearly applies in principle, at least, to the cases now in hand.

That the interest or convenience of the railroads and the methods by which their business is conducted cannot be used to make an act regulating local commerce invalid was also decided in Missouri Pacific Railroad Company vs. Kansas, 216 U. S., 262, 284, where the court said: "From these assumptions it is insisted that the order must be construed according to its necessary effect, and therefore must be treated as imposing a direct burden upon interstate commerce by compelling the operation of the passenger train not only within the State of Kansas, but beyond its borders. But under the hypothesis upon which the con-

tention rests, the operation of the train to Butler (in the State of Missouri) would be at the mere election of the corporation, and besides, even if the performance of the duty of furnishing adequate local facilities in some respects affected interstate commerce, it does not necessarily result that thereby a direct burden on interstate commerce would be imposed. Atlantic Coast Line Railroad Company vs. Wharton, 207 U. S., 328."

In Assaria State Bank vs. Dolley, 219 U. S., 121, 126, it was contended that the bank guaranty law of Kansas to which the National banks could not conform was invalid for that reason. It was admitted that these banks perform a function of the Federal Government, that they could not comply with this law and therefore could not compete with the State banks. The ground of complaint was that the law imposed certain conditions upon contributors sharing the benefits and burdens of the guarantee funds; that the appellants would not or could not contribute and, "unless they did, the effect of the law would be to drive them out of business." The court replied: "That so far as the plaintiffs were concerned, it did not appear that they could not change their condition so as to enable themselves to contribute." Proportionately, the financial result might be far more serious to a National bank through its inability to comply with the State bank guaranty law than to a transcontinental system from adjusting interstate to local rates, but in each case it would be the voluntary act of the corporation rather than the legal compulsion of a State regulation that brought about the result.

A showing along practically the same lines as to the effect of local upon interstate rates has been presented in

the recent cases of Oregon, etc. Co. vs. Campbell, 172 Fed. Rep., 957; Southern Pacific Railway Co. vs. Nevada, 184 Fed. Rep., 358; L. & N. Ry. Co. vs. Siler (C. C. A.), 186 Fed. Rep., 176, supra, and the Arkansas Rate Cases, 187 Fed. Rep., 290. In each the position taken in the Minnesota case was fully discussed and its correctness denied.

In L. & N. R. R. Co. vs. Siler, *supra*, p. 200 (by Judge WARRINGTON) the court said: "the fallacy of ascribing equality to the presumption of fact and rule of law in both conclusive and permanent effect may, we think, be further tested by the consequences. The logic of the company's argument would release its local rates from governmental regulation altogether; for the United States could not fix the local rates, because they are local, and the State could not change them, because it would thereby cast a direct burden upon interstate commerce." In this the court followed Railway vs. Kansas, 206 U. S., *supra*, 283, where it was held that: "To sustain the proposition would require it to be held that the local traffic of the road was free from all Government regulation."

And the court declined to hold invalid the regulation of local commerce made by the State of Kentucky on account of its effect on interstate rates through a change made by the railroads themselves for what the court characterizes as "strictly business reasons." Such a change in interstate rates, the court says, has an indirect and not a direct effect on interstate commerce, and it answers in the negative the question: "Whether a business or economic policy of a railroad company as distinguished from a requirement of law can be said to be a direct and not merely an indirect effect of the State's action?"

In Oregon, etc. Co. vs. Campbell, 173 Fed., *supra*, (p. 985), the court, after thorough consideration of a similar case, gave its conclusion as follows: "If this kind of traffic, with the freight rate imposed upon it by the State, is of such proportions and such percentage as to affect trade in interstate merchandise, and therefore render it advantageous to interstate lines to change their rates so as to control the trade in certain channels, that is not a trenching upon the exclusive authority of Congress to regulate interstate commerce. The interference is but incidental, and flows from a perfectly legitimate regulation of freight rates by the State and an altogether natural movement of trade; and the condition is absolutely beyond the control of Congress."

V.

Another point upon which the decision in the Minnesota case rests, is that the difference between the local rate and the interstate rate between competing commercial centers makes a discrimination forbidden by the Hepburn Act. This brings the matter within range of the dilemma, under the very argument of the court. It is said that the fixing of the local rate is a direct regulation of interstate commerce because the interstate rate must be changed to comply with the local rate. If such change be made there would be no discrimination. If the change be not made then the discrimination would clearly not be prohibited by the Hepburn Act because it is limited in its effect by the following proviso: "Provided, however, that the provisions of this act shall not apply to transportation of persons or of property or the receiving, storage, handling of property wholly within one State and not shipped to or from a for-

eign country or from or to any other State or Territory aforesaid."

In the interpretation of this provision of the Hepburn Act, in L. & N. vs. Siler, 186 Fed., *supra*, (199), the court said: "Complainant's adherence to its interstate rates and its observance of the new local rates in dispute would not, under the interstate commerce act, be regarded as an intent to discriminate."

But mere difference is not discrimination. If two distinct authorities give like subjects unlike treatment there is a difference. There can be no discrimination except when the same authority treats like subjects diversely.

VI.

It is not held in the Minnesota case that the law was passed, or the order of the Railroad Board made for the purpose of regulating interstate commerce, but only that they are invalid because of their effect on such commerce. The question then arises whether, in the absence of such an intention or direct effect the State's action can be overthrown by the court on account of what it is held carriers will be or have been led to do in their interstate business by the laws of trade and competition or by "business necessities." The true principle is thus stated in the Northern Securities case by the present Chief Justice, 193 U. S., 394-5: "Where an authority is exerted by a State which is within its power, and that authority as exercised does not touch interstate commerce or its instrumentalities, and can only have an effect upon such commerce by reason of the reflex and remote results of the exertion of the lawful power, it cannot be said, without a contradiction in terms, that the power exercised is a regulation, because a

direct burden upon commerce. *To say to the contrary would be to declare that no power on any subject, however local in its character, could be exercised by the States if it was deemed by Congress or the courts that there would be produced some effect upon interstate commerce.* The question whether a burden is direct and therefore constitutes a regulation of interstate commerce is to be determined by ascertaining whether the power exerted is lawful, generally speaking, and then finding whether its exercise in the particular case was such as to cause it to be illegal, because directly burdening interstate commerce. If in a given case the power be lawful and the mode in which it is exercised be not such as to directly burden, there is no regulation of commerce, although as an indirect result of the exertion of the lawful power *some effect may be produced upon commerce.* In other words, where the power is lawful, but it is asserted that it has been so exerted as to amount to a direct burden, *there must be, so to speak, a privity between the manifestation of the power and the resulting burden.*"

Privity means the direct operation of cause on effect unbroken by the intervention of another agency. Here the intervening agency which breaks the privity is action by the railroads themselves in changing their rates for interstate commerce as a matter of business policy.

VII.

The correctness of the theory upheld in the Minnesota case may be "further tested by the consequences," as was done in L. & N. R. R. Co. vs. Siler, *supra.* One of these is that an act of a State regulating rates of transportation within its domain is to be overthrown without regard to

the question whether, under those rates, the railroads would enjoy a reasonable return upon the value of their property used in such transportation. The fixing by the State of rates for purely local carriage is unquestionably the exercise of a power which is exclusive as well as lawful. The existence of such power begets a duty, and each State owes to its people the duty to secure them reasonable rates and proper service. To assert that the performance of this legal duty can become unlawful, except for interference with guaranteed rights of citizens, is a contradiction in terms. So far as mere public considerations are concerned the control of the States over their own affairs is supreme.

"The internal commerce of a State—that is the commerce which is wholly confined within its limits—is as much under its control as foreign or interstate commerce is under the control of the general Government." Sands vs. Manistee River Imp. Co., 123 U. S., *supra*, 295.

There is a clear distinction, in this respect, between rates for carriage and the instruments and agents by which carriage is performed. When these are employed in through as well as in local business, their interstate cannot be separated from their State character. So, while the State does not for that reason lose its police authority over trains, crews, etc., in so far as they are local, it must respect the authority of Congress over them in so far as they are not local, just as Congress must respect the authority of the State in exercising its own.

But passengers and goods whose starting point and destination are in the same State are entirely distinct from passengers and freight whose starting point and destination are in different States, though both may be carried on

the same train. So the authority of the States to regulate rates in the one case and that of Congress to regulate rates in the other cover wholly different subjects and not the same subject and, as to each other, the two sovereignties are under no legal restriction.

The rule in the Minnesota case is that the reasonableness of the local rates fixed by the State is not to be made the test of their lawfulness, nor even that of the interstate rates if the railroad companies should make them conform to the local rates. For example: Assume that the interstate rate for a shipment from Cincinnati, Ohio, to St. Louis, Missouri, is $1.25 per hundred and that through the action of Ohio, Indiana and Illinois, the local rates between Cincinnati and St. Louis are fixed so that the sum of the locals between those two points would amount to only $1.00 a hundred. It is claimed that it is necessary for the railroads then to make their interstate rate to $1.00 per hundred, on the theory that it cannot be greater than the sum of the local rates. Then, according to that decision, the acts of Ohio, Indiana and Illinois would be rendered invalid, even though the railroads would enjoy a reasonable return upon the value of their property under a $1.00 rate between Cincinnati and St. Louis, as well as under the local rates for shipments in each of the States named.

This demonstrates the error of the decision because, as was well said in 184 Fed., *supra* (p. 360), the one touchstone for determining the right of railroad rate regulation is whether "it is a reasonable regulation." "A rate fixed by a State Railroad Commission for intrastate traffic," said the court, "if just and reasonable in and of itself, cannot be held to be unlawful and discriminatory because it

may conflict with some rate fixed by the railroad company for interstate traffic. Upon adjustment the latter rate must yield."

The test cannot be whether the effect of fixing the local rates may or will be to lead the railroads to lower their interstate rates, but whether the local rates are fair and reasonable, for if they are so and the sum of them is so much lower than the interstate rates as to lead shippers to take the trouble and risk of rebilling or reshipping at State lines, this is a perfectly lawful condition the advantage of which the public is entitled to enjoy. And as the cost and convenience of carriage in that way can be no less, but, as is well known, would rather be greater, the advantage would remain with the through rate even if it were reduced so as to equal the sum of the local rates. The railroads cannot invoke the commerce clause of the Federal Constitution to shield themselves against fair and reasonable rates fixed by a State for its own internal business. The effect of these on interstate rates is not only incidental and indirect but also legitimate under the dual form of government through which we enjoy happiness and prosperity beyond compare.

If the local rates as reduced by Minnesota are still fair and the reduction leads the railroads to lower through rates correspondingly, then interstate commerce will have been relieved of a burden instead of having one imposed on it; and this would be accomplished not directly by the State's regulation of its own commerce but indirectly by the action of the railroads themselves which would be only just and right.

VIII.

Further testing the correctness of the Minnesota decision by the consequences, it is plain that the inevitable effect of the idea that business necessities, peculiar location of lines of transportation and of commercial centers can make an act of a State regulating its local rates a regulation of interstate rates and therefore invalid, would finally result in the destruction of the control of the State over its own affairs generally.

The right of State regulation extends to every business conducted within its borders, though such business may also extend into interstate commerce. Any act regulating or affecting an enterprise having an interstate character necessarily affects the conditions under which it competes with like enterprises carried on in other States. This will apply to telephones, telegraphs, natural gas and oil companies and many other enterprises. And the passage of a law regulating the hours of labor within one State might make it difficult or impossible for its corporations or citizens to compete successfully with those engaged in the same business in other States where no such regulation exists. The same condition would arise from the passage of a workman's compensation law, or a law changing the liability of employers in one State, when other States have no such laws or different ones.

If the right of State regulation depends upon conditions as they may be found by the courts from time to time on varying proof and not on the fundamental principles of the Constitution, then this right is truly "a precarious and evanescent thing." Railway vs. Campbell, 173 Fed., *supra*, 985.

If the doctrine is to be that the laws of trade may make the performance of a lawful duty by a State in the regulation of corporations doing business therein a regulation of interstate commerce, who is to prescribe the test or rule for applying it? Or shall we go to the logical conclusion that the laws of trade are higher than the Constitution and must prevail without regard to the directness or extent of real or fancied interference with their full operation and effect?

Surely the way to avoid the difficulties and embarrassments which would arise on every hand is to hold that from the duty of a railroad company to charge only reasonable rates arises the duty of the State, by proper regulations, to fix and enforce such rates, and that the exercise by a State of its legal right in the performance of this legal duty with respect to its internal commerce cannot be made illegal through business necessities or adjustments incident to competition. If the railroad company enjoys a reasonable return under such regulation, it enjoys every right to which it is entitled.

There can seldom be regulation by a State of a business conducted within its domain without some resulting effect upon the interstate business which the same concern conducts. A State regulation which was plainly invalid from its effect on interstate commerce might, from the standpoint of dollars and cents, have less effect upon such commerce than an act which was plainly legal. The test is whether the effect results from the act itself *ex proprio vigore* or from the operation on those engaged in interstate commerce of what are styled laws of competition and rules of trade, which are assumed to be like the laws of the Medes and Persians, though they have always adapted themselves to changing conditions and always will.

IX.

The cases before the court involve no conflict between State and Federal authority. The controversy is between the States and the railroads. No one contends that Congress could exercise any control over the purely internal commerce of the States. The effect of the decision is not to take power from the States and leave it with Congress, but to take power from the States and leave the railroads free to charge whatever rates they please in their traffic within the States, for if the States cannot regulate these rates nobody can.

In The Employers' Liability Cases, 207 U. S., 463, 502, the court denied that "one who engages in interstate commerce thereby submits all his business concerns to the regulating power of Congress. * * * It is apparent that if that contention were well founded, it would extend the power of Congress to every conceivable subject, however inherently local, would obliterate all the limitations of power imposed by the Constitution, and would destroy the authority of the States as to all conceivable matters which, from the beginning, have been and must continue to be under their control so long as the Constitution endures."

The well known history of the formation and adoption of the Constitution, as well as its terms, makes it certain that the people of the States, in conferring upon Congress the power to regulate interstate commerce, did not intend thereby to give to the National Government an authority which would destroy their right to regulate their own commerce. And yet that is the exact result of the decision in question. And further carried to its logical conclusion, as under pressure prompt to come it surely would be, it would make the States of the Union impotent to perform those duties which every commonwealth owes to its citizens.

CONCLUSION.

It may be that the commerce of the country has certain elements of unity so that it cannot be divided without some risk of detriment to the whole by diverse treatment of the parts. But we should have no Union if the Constitution had not made the internal commerce of the States distinct from other commerce and left full control of the former with the States when it gave full control of the latter to Congress. Whatever the risk to commerce as a whole, the people chose to take it in order to avoid risks which they considered worse; and the wonderful development of both State and interstate commerce has proved the wisdom of their choice. It is for them alone to reverse that choice by amending their Constitution, if they think the balance of advantage has changed.

State and interstate commerce certainly have such relations that each is likely to be affected, to some extent, by regulation of the other. And embarrassments may arise from time to time to enterprises extending to a number of States from having to comply with State as well as Federal laws. But all of these, especially railroads, have nevertheless grown and prospered amazingly and there is no reason why they should not continue to do so without seeking, through the courts, to break down the barriers between Federal and State authority which safeguard the individual liberty of citizens.

In this, as in all other cases where inconvenience arises from the division of powers between State and Nation, the only safe and sure reliance is in the intelligence, resourcefulness, patience and common interest of the American

people. They will adjust their business to conditions which result from the form of government they have themselves adopted and require their agents in each branch of it to cooperate harmoniously and heartily.

Only the short sighted, and they are relatively few, will believe that commerce among the States can gain any real or lasting advantage at the expense of local commerce, or that local commerce can thrive long, if at all, from interference with general commerce, even though, by the indirectness of its effect, such interference may escape the condemnation of the law.

The Fourteenth Amendment protects the rights of carriers from invasion under the guise of regulation by either State or Nation. It is not always easy to find the line which separates the domain of public authority from that of private right. But this is not so hard as it would be to trace the indirect effects of regulation by the States and by Congress back and forth across the boundary of their respective jurisdictions. The boundary itself is plainly marked. We who have to do with administering the judicial power have in especial charge the Covenant of the Union and our plain duty is to see that this boundary is respected, leaving further responsibility to the people of the country and the agencies they have created for the regulation of commerce, state and interstate.

Respectfully submitted,

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January, 1912.

Supreme Court, U. S.
FILED
APR 1 1912
JAMES H. McKENNEY,
Clerk.

In The
Supreme Court of the United States
October Term, 1911

JOHN A. KNOTT, et al,
vs.
C. B. & Q. R. R. CO. } No. 9

And the other Missouri rate cases pending on appeal Nos. 10 and 672 to 705.

Oregon R. R. & Navigation Co.
vs.
Campbell, et al, } No. 424

L. & N. R. R. Co.
vs.
Siler, et al, } No. 507

Simpson, et al,
vs.
Shephard, } No. 599

And the other Minnesota rate cases, Nos. 600 and 601.

On Appeal from the Circuit Courts of the United States for Missouri, Minnesota, Arkansas, Oregon and Kentucky.

BRIEF

Filed on behalf of States of South Dakota, Nebraska, Iowa, Kansas, Alabama and Oklahoma, *Amici Curiae*.

For South Dakota—R. C. Johnson, Attorney General; P. W. Dougherty, Assistant Attorney-General.

For Nebraska—Grant G. Martin, Attorney-General.

For Iowa—George E. Cosson, Attorney-General; J. H. Henderson, Commerce Counsel.

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In The
Supreme Court of the United States
October Term, 1911

JOHN A. KNOTT, et al,
vs.
C. B. & Q. R. R CO. — No. 130

And the other Missouri rate cases pending on appeal Nos. 134, and 672 to 705.

Oregon R. R. & Navigation Co.
vs.
Campbell, et al, — No. 424

L. & N. R. R. Co.
vs.
Siler, et al, — No. 507

Simpson, et al,
vs.
Shephard, — No. 599

And the other Minnesota rate cases, Nos. 600 and 601.

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CONTENTS

INTRODUCTORY.

(a) *Reasons for this Brief.*

(b) *Magnitude of Interests.*

A. *Interstate Commerce.*

B. *Values.*

(a) What to be valued.

(b) Land dedicated to quasi-public highway becomes common highway on termination of special use.

(c) These cases give too high a value to the right of way and track.

(d) Division of values.

(e) Only terminals within the state can be used for intrastate business.

C. *Cost Accounting.*

(a) Effect of Methods of Division.

(b) Methods of Division of Expense.

1. Gross Earnings Basis.
2. How far is valuation between expense and receipts variable?
3. Revenue Train Mile Basis.

(c) Correct Methods of Division.

(d) Extra Cost Theory.

(e) *Reductio ad absurdum.*

(f) Cause of Extra Cost.

D. *Notorious Facts.*

(a) Historical Discrimination against local rates.

(b) Necessity of Equality.

(c) Retarded Population.

(d) Enough Railways.

(e) Improvement in Service.

(f) Stationary Freight and Fare.

(g) Unjust Burden on Short Haul.

(h) Competitive Rates descended till 1899.

(i) Less Reduction in Local Rates.

(j) State Rates Abnormally High.

(k) Condition of Carriers Affected.

(l) Rates to Move Traffic.

(m) Statistical Examinations.

(n) Immoderate Expenses.

(o) Discretion as to Charging to Expense.

FINALE—*The Practice Suggested.*

RESUME.

Considerations Urged in This Brief.

(1) No state-made rate established for purely internal commerce within the state can in law or fact interfere with competing interstate commerce so as to infringe upon the exclusive power of congress. Any interference occasioned is by competition of business not state action.

(2) The lower courts have, without legal evidence therefor, assumed excessive values, considered property for which no return should be earned.

(3) Careful cost accounting is absolutely necessary to justice in these cases.

(4) A discussion of the notorious facts underlying these cases.

INTRODUCTORY.

(a) Reasons for This Brief.

The cases now before the court involve rates, both passenger and freight, made by authority of the states of Missouri, Minnesota, Oregon, Kentucky and Arkansas.

But other states, because of the pendency therein of cases involving substantially identical questions, deem themselves even as vitally affected.

Questions of like character now pending in Alabama, Iowa, Kansas, Nebraska, Oklahoma and South Dakota, impel those states to join in this brief with the intention of suggesting to the court the extent of the interests involved and the nature of some of its common features.

(b) Magnitude of Interests.

In the recent investigation of advances in rates by carriers in official classification territory (decided February 22, 1911), Mr. Commissioner Prouty in describing the magnitude of the question then before the Commission used this language: (20 I. C. C. 249.)

"It should be noted moreover in this connection that those who are most affected by these advances are usually not represented at all in such discussions. While it is true that the increased rate adds to the cost of production and while at the outset this increased cost must perhaps be borne by the manufacturer or wholesaler, still in the end the freight rate, like any other item of expense, finds its way into the price paid by the consumer. The freight rate may limit the operations of a particular factory, or may exclude the jobber from a particular market, but the ultimate producer and consumer bear for the most part this burden.

* * *

"This commission must stand for the entire public, in-

cluding the railroads. It cannot accede to the mere wish of any class; it must recognize the just demands of all classes; and it must have in mind those who do not appear as well as those who are represented before it."

In like manner we desire this court to consider those who are not parties, but who will be vitally affected by any decision.

A.

Interstate Commerce.

Do state-made rates, i. e., rates made by the legislature or administrative boards, either passenger or freight, applying to the purely internal commerce of and between stations within a state, over lines of railway, wholly within a state, infringe, interfere with or impose a burden upon interstate commerce within the inhibition of the commerce clause of the federal constituiton?

The congress shall have power:

To regulate commerce with foreign nations, and among the several states, and with the Indian tribes.

Sec. 8, Art. 1, Constitution:

This constitution and the laws of the United States which shall be made in pursuance thereof, and all the treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every

state shall be bound thereby anything in the constitution or laws of any state to the contrary notwithsanding.

Sec. 2, Art. VI., Constitution:

The powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively or to the people.

Amendment X., Constitution.

It is admitted that the states can and should control their own internal affairs, it is admitted that congress cannot, under the constitution, directly control them, and it is decided that while, in the Missouri and Arkansas cases, the rates do not control interstate commerce, yet in Minnesota, because of the territorial location of certain cities and towns in Wisconsin and North Dakota, the intrastate rates do work an interference with interstate commerce.

Competition in business creates centers in constant and continuous struggle for mastery. Competition is the law of life. It is competition which has made America what it is. State and interstate rates ought to touch and in a way compete. Precisely, this is the scheme of the American experiment, that the dual system of government might each be a check on the other by the facts of the world, yet each supreme in its own sphere by law.

Coyle vs. Smith, 31 Sup. Ct. Rep. 688.

It must be conceded that in the exercise of this power by the separate jurisdictions, there will be some reciprocal touching of the intra and inter-state rates, and this must of necessity follow under our system of government.

The powers of the states each over its internal commerce and of the Federal Union over interstate or international trade, are not comparative or relative; each is absolute and independent. The power of the states cannot proceed within the domain of the Federal rule. The rule of the Union cannot take a single step within the territory of the states' duties. It is only in the Minnesota case (and in Alabama by the Master) that there is a finding by the court that the rates enacted by the legislature and promulgated by the Railroad and Warehouse Commission, because of the territorial location of certain cities and towns in Wisconsin and North Dakota as compared with the location of cities and towns in Minnesota, work an interference with interstate commerce. If this is to be the rule, then the territorial location of certain cities and towns in Wisconsin and North Dakota, and not the limitations of the Federal Constitution, deliminate the power of the state to make rates applicable to purely internal commerce between stations on lines of railway wholly within the state.

It is not claimed that any state, Minnesota or any other, has, by legislative enactment or order, promulgated by its

railroad commission, attempted to directly control interstate commerce, it is not urged that any state has provided interstate rates, but it is insisted that Minnesota has provided rates for its internal commerce, which are of such a nature that the interstate commerce now existing will be seriously affected unless the intrastate rates are changed. That these intrastate rates from point of supply to point of consumption are so different from the present interstate rates from other and different points, that business following the line of competitive substitutes will be supplied on the intrastate rather than the present interstate rates. Is it, then, the law of the state of Minnesota promulgating the passenger and commodity rates and the order of its Railroad and Warehouse Commission adopting its merchandise rates, or the scientific law of competitive substitutes, which is interfering? It is said that the interference is not of law, but of fact. If so, will it not be more logical to enjoin the business law of competitive substitutes than the Minnesota rates? For instance, a mill manufacturing Portland cement in the city of Des Moines, Iowa, desires to engage in interstate commerce and ship its product to the city of Dell Rapids in South Dakota. Subsequently a similar mill is built in Yankton, South Dakota, and desires to do an intrastate business and ship and sell its products to Dell Rapids in South Dakota. Should the court enjoin the owners of the mill at Yankton for any such reason as that, in conformity with the

business law of competitive substitutes, the shipment of its product from Yankton to Dell Rapids will impose a burden upon and take away from the interstate commerce transacted by the cement mill located at the city of Des Moines?

In Assaria State Bank vs. Dolley, 31 Sup. Ct. Rep. 189, an argument in all principles identical with that made here was presented and refuted. It was there agreed before this court that the national banks in Kansas were functions of the Federal government, and that the state bank guaranty law was in its nature and workings such that the national banks could not compete with the state banks, and that therefore the state law should be nullified.

"The ground of complaint was that the law imposed certain conditions upon sharing the benefits and burdens of contributors to the guaranty fund; that the appellants would not or could not contribute, and that unless they did, the effect of the law would be to drive them out of business."

* * * * * * *

"To all this the court replied that so far as the plaintiffs were concerned, it did not appear that they could not change their condition so as to enable themselves to contribute."

This court considered further discussion unnecessary. The converse of the proposition here is presented in the case of Louisville & Nashville Ry. Co., vs. Eubank, 184 U. S. 48, 22

Sup Ct. Rep., 277.

This question is discussed and the authorities so ably reviewed in the cases of Siler vs. L. & N. Ry. Co., 186 Fed. 176; Woodside vs. Tonopah and G. R. Co., et al, So. Pac. Co. vs. R. R. Com. of Nevada, 184 Fed. 358, and Campbell vs. Oregon R. R. & Nav. Co., et al (Oregon Case), that further argument is superfluous.

The congress, in conformity with the provisions of the Constitution, for the purpose of regulating the purely interstate commerce of the nation passed the act to regulate commerce among the states, and by the very terms of that act the internal or intrastate commerce of the several states is excluded from the operation of its provisions.

Act to regulate commerce, Secs. I. and IV., as amended by the act of June 18, 1910:

The genius and character of the whole government seem to be that its action is to be applied to all the external concerns of the nation; and to those internal concerns which affect the states generally, but not to those which are completely within a particular state, which do not affect other states, and with which it is not necessary to interfere for the purpose of executing some of the general powers of the government. *"The completely internal commerce of a state, then, may be considered as reserved for the state itself."*

Is it not nearer the truth to assert that within the United States two separate and independent powers of control over commerce obtain, each exclusive within its exclusive domain, one a power delegated by the states to the federal government, and the other a power reserved to the several states, than to say that the exercise of this power of control by either is an infringement of an interference with or burden upon the power of the other? This is based upon the assumption that, under the Constitution of the United States, the separate states have no power to regulate interstate commerce, and that the congress has no power to regulate the internal or intrastate commerce of the several states. The federal government (the congress) having no power to regulate internal or intrastate commerce of the several states, if the states have not this exclusive power over their purely internal or intrastate commerce, then the several states are relegated to regulation by the common carriers in so far as the rates for the transportation of their purely internal or intrastate commerce is concerned.

To assert that the states cannot regulate internal rates because such rates do or might interfere with interstate competing rates, is to assert that states cannot regulate rates at all, because all rates do or might compete with other, including interstate rates.

To assert that states cannot regulate internal rates is to assert that state governments cannot regulate internal business of any character, because all internal business does or might compete with interstate business. To assert that states cannot regulate any state business is to destroy the states, because thereby they are rendered ineffective and useless.

To adopt the rule announced by the court in the Minnesota rate case will result in lodging the entire power of making rates, applying on internal or intrastate commerce with the railway companies, based, as described by the Wisconsin Railroad Commission in the case of the Southern Wisconsin Cheese Makers Protective Association vs. C. M. & St. P. Ry. Co., 3 Wis. R. R. Com. Rep. 459, upon considerations of distance, value, space, weight, competition, clamor, importunity, petition, demonstration, threat, reprisal, revenge, good-will, favoritism, chance, tradition, speculation, metaphysical generalities and vague notions of all kinds and degrees of conscience. These appear to be the only admitted guides and rules of the rate makers.

In view of all that has been said and written upon this question, we confidently insist that the only protection afforded by the United States Constitution of which the railway companies involved in the litigation now before this court may or should be permitted to avail themselves, is against rates, the obvious effect of which would be, as applied to future and

not past traffic, the confiscation of property. This being the rule, the several states are then left to regulate their internal commerce and rates, may not then be reduced below the point of reasonable remuneration, a question of fact to be determined upon by the volume of traffic in each state.

B.

VALUES.

(a) What to Be Valued.

In a rate suit the value to be attributed to the carriers' property is the value of the property used by the public interested in the suit. Whatever is a facility for this public is to be included, but nothing which is a facility for the company and not this public.

The public uses the highway, the terminal facilities, the equipment. Further, nothing. The transportation facilities, the equipment, terminal and highway are to be considered separate from the possessions upon which they rest or operate. The full value of the transportation facilities to buy new, the cost, the depreciation, should be considered in the six ways pointed out by this court in Smyth vs. Ames.

But there should be a different rule as to the possessions upon which the works are, from the works themselves. Let us separate real estate used for right of way from other real estate. The

former has no value, except the actual and prudent and legal cost of acquisition. Where right of way is given free as in Minnesota to the Northern Pacific, or a street freely granted, or other franchise freely used, there is no element of value to be considered. Else the public must pay for its own generosity to itself. These grants do not constitute private property in the hands of railways. They are public grants of power, not property, delegated to the railways who are to perform a public function with them. The condemnation cost unanalyzed is not the criterion. For condemnation includes both the cost of the real estate and the damage of the use. The rule of multiplying the present vicinity values by three to reach railway value now pre-supposes improvidence in acquisition. That is, that the roads paid thrice its present value. And also overlooks the severance damage which never became a value, and ceased its existence in any event as a cause of cost as soon as severance was complete. What this property should have cost the government if the public had undertaken the work at the time and in the circumstances and manner surrounding the actual enterprise, is the value to be placed upon the right of way. That is, if a nominal but actual purchase price was paid, it should be considered. If nothing, then nothing is the value of the right of way.

As to other real estate, only that used for transportation should be considered. Any held or used for speculation should

be excluded. It cannot be law that the public should pay for more than it uses.

The "bare bones" of the enterprise, stripped of any going concern value or franchise right, is the value in a rate suit (Omaha vs. Omaha Water Co., 218 U. S. 180), but modified by a consideration of what it prudently cost to build up the business is the value on which a return should come. (Comr. Lane, Advances in Rates, 20 I. C. C. 347.)

For instance, the Northern Pacific was granted by law a right of way 400 feet wide for railway purposes. It cannot sell it, though fifty feet is more than it can use ordinarily. It cost it nothing. It is a highway. Over it the road may transport passengers and freight and take tolls for this. Similarly, the right was given by law to the "Diamond Joe," or any other river steamship line to navigate the Mississippi River and transport passengers and freight and take tolls therefor. The property that each has in each instance is alike; the terminal and transportation facilities. Their value will, of course, depend upon the particular devices employed. But in neither case should the highway be considered; though in one, the grade and track, because it is a facility; in the other nothing of this kind, because no works of this kind were placed there by the company.

The point becomes clearer still if a canal be con-

sidered. In this case let us suppose the canal were built by the government. The property of the transportation line therein would be but what it is in the river. But if the canal were built by the company, we have the same rule as that governing the railway. If boats of the company and other boats of other persons had access to such a canal, built by the company, the property in the canal, in such case, would be like that of a turnpike company in its highway.

But, on the other hand, if anything is paid for the right of way by either the turnpike, the canal or the railway company, such investment, if prudently made, is a part of the highway value. Any other reasoning leads to these results:

In the supposed case of the river steamer a return on the value of the river is as reasonable as a return on the value of the highway for real estate purposes.

In the case of a leased roadbed each lessor could claim the value of the right of way for real estate. The lessor has a contract right to use the roadbed, the grantee has the legal right to use the highway. Only his investment should bring returns.

If the railway right of way was abandoned there would be no property in it in the carrier.

In Erie Co. vs. Casey, 26 Pa. St. 287, a charter was repealed and the state government took possession of the road.

This was claimed to be seizing private property. At page 307, Black, J., says:

"This act takes nothing but the road. Is that private property? It is a public highway, solemnly devoted to the public use. When the lands were taken it was for such use, or they could not have been taken at all."

Railroads established upon land taken by the right of eminent domain (here dedication from the public domain to public use) by authority of the commonwealth (here anticipatory of the authority of the commonwealth), created by her laws as thoroughfares for commerce, are her highways. *No corporation has property in them, though it may have franchises annexed to and exercisable within them.*

See also Talcott vs. Twp. of Pine Grove, 1 Flipp. 146.

By a long line of decisions this Court has held identical in principle the law of the railway right of way grant and the law of the highway dedication.

See Lake Superior Co. vs. U. S., 93 U. S. 442 at p. 450.

A. T. & S. F. Co. vs. D. & N. Co., 110 U. S. 667, at p. 667.

U. P. Co. vs. C. R. I. & P. Co., 163 U. S. 564 at p. 585.

(b) Land Dedicated to Quasi Public Highway Use Becomes Common Highway on Termination of Special Use.

A familiar instance is that of turnpikes. The resumption of the sovereign power in the franchise leaves the easement in the public in the road. The land owners (grantors or successors) presumed to have received full compensation for the permanent easement.

State vs. Maine, 27 Conn. 642.
Craig vs. People, 47 Ill. 487 at p. 493.
Northern Central Co. vs. Com., 90 Pa. St. 300.
P. McK. & Y. Co. vs. Com., 104 Pa. St. 583 at p. 586.

McManus Appeal, 5 Pa. Sup. Ct. R. 65.
Peo. vs. Bd. Supervisors, 151 N. Y., 190.
State vs. Noblesville Co., 83 Md., 466 at p. 469.
Comr. Highways vs. Cobb, 104 Mich. 395.
Virginia Co. vs. Peo., 22 Colo. 429, 37 L. R. A. 711, and notes.

Wood et al, vs. Turnpike Co., 24 Cal. 475.
Peo. vs. Davidson (Cal.), 21 Pac. 538.
McMullin vs. Leitch et al. (Cal.), 23 Pac. 294.
Blood vs. Clayton Co., (Cal.) 33 Pac. 885.
Kellett vs. Clayton Co., (Cal.) 33 Pac. 885.

The rule is the same when the right of way is granted by congress.

Western Plank Co. vs. Central Tel. Co., 116 Ind. 229.

Nevada vs. Lake, 8 Nev. 276 at p. 281.

Or under acts of a territorial legislature.

State vs. Lake, *supra.*

State vs. Dayton Co., 10 Nev. 155, p. 162.

The matter is tersely put as follows:

"The fee title being conveyed, there could be no reversion. If, for any reason, the turnpike company ceased to exist, and could not longer own the land, it might escheat, but it would not revert." Per White, J., in

Langston et al. vs. Edwards et al. (Ky.), 54 S. W. 833.

(c) These Cases Give Too High a Value to the Right of Way and Track.

These cases have shown a well-marked tendency to give an excessive valuation to railway property in estimating the returns thereon made by the promulgated rate.

The same purpose was sought by the same means in the recent cases before the Commerce Commission. To the dis-

cussion of that subject given by Commissioner Lane, pages 337 to 347, 20 I. C. C., little of importance can be added.

We urge his conclusion here. It was:

"The trend of the highest judicial opinion would indicate that we should accept neither the cost of reproduction upon which the Burlington's estimates of value is made, nor the capitalization which the Santa Fe accepts as approximate value, nor the prices of stocks and bonds in the market, nor yet the original investment alone, as the test of present value for purposes of rate regulation. Perhaps the nearest approximation to the fair standard is that of a bona fide investment—the sacrifice made by the owners of the property—considering as a part of the investment any shortage of return that there may be in the early years of the enterprise. Upon this, taking the life history of the road, through a number of years, its promotors are entitled to a reasonable return. This, however, manifestly is limited for a return should not be given upon wastefulness, mismanagement or poor judgment, and always there is present the restriction that no more than a reasonable rate shall be charged."

We desire the Court to note that in the case of Reagan vs. Farmers Loan & Trust Company, 154 U. S. 404, it is admitted that the property was worth more than the capitalization. (Per Moody, Justice, in Knoxville vs. Knoxville Water Co., 212 U. S. p. 17.) The Court found the replacement value of *that property to be* $30,000 *a mile.*

In Smyth vs. Ames, 169 U. S. 466, 548, the court quotes with apparent approval the statement of Mr. Dilworth *that the lines could not be duplicated for* $30,000 *a mile.*

In the opinion of Mr. Commissioner Prouty in 11 I. C. R. 238, speaking of the Texas lines he says they can probably be reproduced with equipment for *from* $25,000 *to* $30,000 *a mile.*

Again in Farmers, etc., vs. A. T. & S. F., 12 I. C. R. 351, he discusses testimony that the main lines of the A. T. & S. F. in Kansas can be reproduced for $25,000, branch lines for $15,000 without equipment or terminals.

In the recent case before the Commission, Mr. Lane cites the values fixed by the railroad commissions of Wisconsin, Minnesota and South Dakota, discusses (p. 345) the similar statements of the same railway contractor as discused by Mr. Commissioner Prouty in 12 I. C. R. 351, and finally calculates the returns of the carriers on tables estimating the value at $36,000 and $40,000 per mile, single track, on the average. Clearly this is high enough for the states involved here.

Corroboration that these roads should not be considered more than $30,000 per mile in value may be gleaned from this fact:

In "United States Statistics of Railways," compiled by the Interstate Commerce Commission, for 1900, page 54, appears this statement:

"The aggregate amount of railway securities reported by the carriers as outstanding on June 30, 1900, was $11,491,034,960, being an increase as compared with the previous year of $457,080,062. If this increase be added to the increase in railway securities during the years ending June 30, 1899 and 1898, it appears that the increase in railway securities during the three years previous to June 30, 1900, was $856,026,886. Confining comment to the year covered by this report, it is pertinent to notice that the increase of $457,080,062 in railway securities is synchronous with an increase in mileage of 4,051.12 miles. *It can hardly be claimed that the issue of securities for the construction of this new mileage would exceed* $120,000,000, *which would leave an increase of* $327,080,062 *to be explained in some manner.*"

If the four thousand odd miles of road could not have cost more than $120,000,000 to construct, the average cost of road could not have been more than $30,000 per mile.

Further corroboration that these roads should not be considered at more than $30,000 a mile is to be found in the fact that in Census Bulletin No. 21 the roads are valued in accordance with what the railways themselves claimed for them. Professor

Henry Adams at page 8 especially warns us:

"The commercial valuation of railway property, in so far as it depends on income arising from the sale of transportation, is the result, among other things, of an established schedule of freight and passenger rates, from which it follows that such a valuation can not be used for determining the reasonableness or unreasonableness of the rates in question. The solution of the rate problem demands a separate valuation of the physical property."

At page 11 he says, answering an objection that may be raised to the valuations, that "insofar as this value is based upon the sale of stock instead of the sale of the road itself, that the valuations submitted in this report are too high." Yet even based, as they are, too high, the average value of roads west of Chicago is much less than that found by the courts in these cases. Professor Adams gives a value for:

Missouri of	$40,200 a mile
Kansas of	40,400 a mile
Nebraska of	45,200 a mile
Oklahoma of	30,100 a mile
Indian Territory of	31,400 a mile
South Dakota of	16,300 a mile
Iowa of	35,000 a mile
Arkansas of	30,200 a mile
North Dakota of	38,700 a mile

Why North Dakota is valued at more than twice as high as South Dakota, or Nebraska higher than Missouri, $10,000 a mile higher than Iowa, will only be found from noticing the method upon which the valuation is made.

On page 9 Professor Adams says the "value of railway property submitted in this report was arrived at by capitalizing individual earnings of railways and railroad systems."

The point is that the roads are more profitable to the railway corporations in Nebraska than in Iowa and Missouri, and more profitable in Kansas than in Iowa, and are making more money in North Dakota than in South Dakota. Likewise in that report Minnesota is valued at $59,800, but Michigan at $32,000 and Wisconsin at $40,000. It goes without saying that the railways in Minnesota cannot have a greater value than those in Wisconsin and Michigan, and that the figures stated in this report are simply the result of the extortionate charges made in Minnesota, Nebraska and Kansas, in comparison with the charges in Michigan, Wisconsin and Iowa. But the result of an examination of the table is conclusive that west of the Mississippi a valuation of the physical property cannot exceed $30,000 a mile.

(d) Division of Vlaues.

In the division of values occurs many transparent mis-

takes. We call the court's attention to what is said hereinafter under the head of "effect of methods of division." It is a matter of enormous difference whether the ton mile, track mileage, gross revenue or percentage of expense methods be used in dividing the value of the property not only between states, but as between passenger and freight, and intrastate and interstate business.

In these cases the lower courts have made a valuation for the state without considering at all the facts represented in Census Bulletin No. 21, page 45, as to division between states. Thereafter they have divided the state value as between intra and interstate use in total disregard of the direction of this court on that subject. In Tompkins vs. C. M. & St. P., 176 U. S. 167, at p. 176. Mr. Justice Brewer examined and discussed the method of dividing the total value of a railway in a state, as between intra and interstate business in proportion to the gross receipts from it.

By Mr. Justice Brewer, 176 U. S. 167.

On this theory a decrease in domestic rates affects likewise interstate rates and *vice versa*.

"Suppose that the total value of the property in South Dakota was $10,000,000 and the total receipts both from interstate and local business were $1,000,000—one-half from each. Then, according to the method pursued by the trial

court, the value of the property used in earning local receipts would be $5,000,000, and the per cent of receipts to value would be 10 per cent. The interstate receipts being unchanged, let the local receipts by a proposed schedule be reduced to one-fifth of what they had been, so that instead of receiving $500,000 the company only receives $100,000. The total receipts for interstate and local business being then $600,000, the valuation of $10,000,000 divided between the two, would give to the property engaged in earning interstate receipts in round numbers $8,333,000, and to that engaged in earning local receipts, $1,667,000. But if $1,667,000 worth of property earns $100,000, it earns 6 per cent. In other words, although the actual receipts from local business are only one-fifth of what they were, the earning capacity is three-fifths of what it was. And turning to the other side of the problem, it appears that if the value of the property engaged in interstate business is to be taken as $8,333,000, and it earned $500,000, its earning capacity was the same as that employed in local business—6 per cent. So that although the rates for interstate business be undisturbed, the process by which the trial court reached its conclusions discloses the same reduction in the earning capacity of the property employed in interstate business as in that employed in local business, in which the rates are reduced."

It would seem that such a demonstration would bar the way of a subsequent attempt to follow such a plan. Yet the lower courts have insisted upon that plan in these cases.

In order that now at least the plan may be abandoned, let us notice that not only in Judge Brewer's supposition, but it is true geometrically that things that are equal to the same thing are equal to each other. And that a division, according to receipts, therefore inevitably raises or lowers interstate business in the same proportion as intrastate rates are raised or lowered. Local rates, as we shall show, are higher than long distance rates. Therefore this plan is plainly unfair to the state rates for the very reason that they are higher than the long distance interstate rates.

In lieu of a division by gross receipts a division by that method which in view of all the circumstances is nearest normal should be followed. For instance, other things being equal, the actually allocated expense caused in the operation of a business is a good indication of the value thereof. Also the volume of the output, that is, number of passenger miles and ton miles, can as between intra and interstate business be used as a check on expenes as a measure.

(e) Only Terminals Within the State Can Be Used in Intrastate Business.

It would appear to prove itself that the Chicago, Galveston, San Francisco, Los Angeles, Seattle and Portland terminals cannot have a bearing on Missouri, Minnesota and Arkansas

intrastate business. In Arkansas there are no valuable terminals. In Missouri and Minnesota there are, of course, large terminals in and around the Twin Cities and St. Louis and Kansas City. Proper allowances for the presence or absence of such terminals should be noted before divisions as between intrastate and interstate values are made.

C.

COST ACCOUNTING.

(a) Effect of Methods of Division.

In all of these cases the railroads base their proof, and their sole proof, upon a method of valuation closely similar to that sought to be followed by the Burlington in the case cited, before the Interstate Commerce Commission, 20, I. C. C. R. 237 and 357, and then seek to prove that the earnings are not sufficient upon such valuation. The amount of receipts for the business done intrastate in each state is obtained with possible accuracy on the basis of track mileage for passenger and freight business, but in all cases there is very serious question whether the proper amount of outside income and miscellaneous earnings are assigned to the state.

If we were to treat the earnings as being sufficiently established, the most serious controversy arises when an attempt is made to establish what the net earnings are. The railroads con-

code that it is a very difficult matter to determine and they absolutely fail to prove what the expenses of intrastate business are as compared to the entire business, both intra and interstate.

Their "gross earnings" theory for making the division is to allot the earnings to each class, that is, intra and inter, and to divide the entire expenses in proportion to such allotment. That is what is commonly called the gross earnings method of division of expenses. The roads further contend that such a division will not attribuate sufficient expenses to the state business. They claim that the transaction of local business is much more expensive than the transportation of other business. They then confuse and identify local business with intrastate business, and confuse and identify other business with interstate business, whereas, in fact, in all the states concerned more interstate business moves on the local train than does intrastate business move on that train, and in many intances more of the state business moves on the other trains than it does on the local trains, so that there is no identification of intrastate with local and interstate with through, in point of fact. To proceed upon this false assumption, the railroads declare that it is necessary to consider what is called an extra charge on state business, because of the asserted greater expense of conducting local business. Through an inadvertence which it is now not possible to explain, the state authorities apparently overlooked this confusion of intra with local and inter with through in the case of Smyth vs.

Ames, and conceded that the state business would be at least 10 per cent more expensive to conduct than interstate business. Upon that concession and assumption in the Ames case, the roads have built up a volume of testimony, variously estimated by *their* witnesses, to the effect that state business costs from a third more to five or eight times as much to conduct as interstate, and, therefore, the division of expense, is thus rested upon what may be termed an extra cost gross earnings theory.

The states contend that the application of the gross earnings theory is a most absolute mistake. They contend in the first place that the volume of business is so very large that the effect of slightly different fractions or per cents will have an enormously great effect upon the result. In the Minnesota and Missouri cases the state authorities adopted the theory that expenses should be divided in proportion to ton miles and passenger miles—that is, in proportion as the roads carried passengers one mile or one ton of freight one mile. In those cases, therefore, the controversy between the roads and the states is whether the extra cost gross earnings theory or the ton mile and passenger mile theory should be adopted. As illustrating the effect of whether the one or the other theory shall be followed, we cite this court to Census Bulletin No. 21, Department of Commerce and Labor, Bureau of Census, an article by Professor B. H. Meyer, now of the Interstate Commerce Commission, written in 1905, as to the methods of distri-

bution of railway values among states. While this is a question of the distribution of the railway expenses as between intra and interstate, and not a question of the distribution of values between states, yet everything said by Professor Meyer as to the effect of different methods is in like sense true of this problem. On page 45 Professor Meyer worked out a table showing the result of dividing the value of two railroads between the different states they traversed in accordance with five different methods.

First, in proportion to all track mileage basis;

Second, in proportion to the ton mileage basis;

Third, in proportion to the gross earnings basis;

Fourth, in proportion to the net earnings basis;

Fifth, in proportion to the basis of bonded or other indebtedness.

We append the table.

Showing the Distribution of Railway Properties on Five Different Bases. Both Railways are Among the Largest Systems in the Country.

Name of State	I. Percentage that the miles of track of all kinds in each state bears to the total number of miles of track of all kinds in the system.	II. Percentage that the number of tons hauled 1 mile in each state bears to the total ton mileage of the system.	III. Percentage that the gross earnings in each state bears to the gross earnings of the system.	IV. Percentage that the net earnings in each state bears to the net earnings of the system.	V. count in each state to the total of such issues and debts for the system.
A	1.67	3.57	2.30	2.63	2.82
B	37.55	45.26	44.50	50.63	42.72
C	20.11	16.30	18.18	21.12	10.90
D	4.12	0.52	1.03	0.11	3.15
E	1.30	0.49	0.70	0.32	0.94
F	2.00	0.33	0.54	0.03	1.17
G	21.00	24.15	21.33	19.62	19.78
All other states	12.23	9.48	11.42	5.54	18.52
Total	100.00	100.00	100.00	100.00	100.00
A	10.08	18.38	17.43	23.35	5.18
B	31.96	36.24	25.42	22.13	31.38
C	3.93	4.81	4.25	0.84	5.01
D	1.08	0.10	0.19	0.27	1.04
E	3.66	2.75	2.03	1.46	3.13
F	3.42	1.96	2.28	0.78	5.29
G	16.11	18.25	19.11	18.39	22.86
H	4.72	1.82	2.18	0.38	3.60
I	6.16	4.68	5.94	5.79	3.08
All other states	18.88	21.01	21.17	26.61	19.43
Total	100.00	100.00	100.00	100.00	100.00

The point we desire to make is that in the distribution of value in the state "A," it made a difference in the case of the first road of more than one hundred and fifty per cent whether the track or ton mileage or the gross revenue was adopted as a basis of division. The proportions were 1.67 for track mileage, 3.57 for ton mileage, 2.30 for gross revenue basis. It will be noticed that whether the track mileage or the gross revenue were adopted, for that road in that state, made a difference of sixty-three per cent or at least fifty per cent increase. If a change were made from the gross revenue to the ton mileage a difference of 1.27 per cent or more than fifty per cent of the gross revenues, and almost 100 per cent of the track mileage would be added, provided the ton mileage theory was adopted. We only mention this for illustration to make plain that whether division of unallotable expense in proportion to allotable expense, or the track mileage, or gross revenues, or the ton mileage system is adopted for Minnesota, Missouri or the other states may make a difference equal to that shown by Mr. Meyer to exist in the case of state "A." *We, therefore, consider it a matter of supreme importance that the correct method of division shall be adopted.*

(Note.) Improper proportion of interstate earnings in plaintiff's methods.

Incidentally, while noticing the effect of adopting different methods of division of property and expenses, it is well to note

an improper division of earnings adopted by the railways as a basis for making their division according to receipts.

Mr. Commissioner Lane at page 361 of his examination of the Burlington states:

"The report of the Santa Fe would make it appear that the expense of moving freight on branch lines is far greater than on main lines."

This is the reason why in division of earnings branch lines ought and customarily are allowed more than a mileage prorate.

On page 49 of Census Bulletin 21, Professor Meyer, treating this question, says:

"The interstate earnings are usually divided for each shipment on a mileage basis. Such a division is, however, open to somewhat the same objections as are urged against the single track mileage method of apportionment of values among the states, except that here the error lies in the opposite direction. The pure mileage basis of prorating receipts from interstate shipments throws too much of the earnings into the district of dense traffic and low unit cost of haulage. As is pointed out in the letter on page 44, '60 per cent of all the traffic of the whole line went to or was shipped from the branch lines. It, therefore, appears that if these branch lines had not existed,

the whole system would have earned only 40 per cent of its previous earnings, which would have made the main line as worthless as the branches.' The pure mileage ratio basis of apportioning the gross earnings of an interstate transaction will, in most cases, yield the branches too small a portion and the main line too great a portion. Probably good argument could be brought in support of the proposition that on an interstate shipment the branch should be allowed the local charge and the main line the remainder; but if this be thought to go too far toward increasing the earnings of the outlying parts, certainly the branch ought to receive the same proportion of the total earnings in any single shipment as its local is to the sum of the locals for the entire route covered. For example, a hundredweight of freight is shipped from Chicago, Ill., to Topeka, Kans., via. Burlington and Kansas City. The local from Chicago to Burlington is, say, 46 cents per hundred; that from Burlington to Kansas City is, say, 60 cents; and that from Kansas City to Topeka is, say, 29 cents. The charge from Chicago to Topeka is, say, 109 cents. Then on the basis here proposed, there would be apportioned to Illinois forty-six one hundred thirty-fifths of 109 cents, to Missouri, sixty one hundred thirty-fifths of 109 cents and to Kansas, twenty-nine one hundred thirty-fifths of 109 cents. Such an apportionment would, it seems, meet the equities of the case much more nearly than an apportionment upon a pure mileage basis.

"For reasons like these here advanced branch lines frequently receive payments on the basis of a constructive mileage. Prorating on a constructive mileage is also done in connection with transcontinental traffic, the practice dating back to a time when the real or assumed cost of operation was greater and the tactical position of the lines was such that they could command a return on a constructive mileage basis. Only where individual interstate shipments are thus prorated, and the earnings within the state added, can the total of the gross earnings assigned to a state be as nearly correct as it should be."

(b) Methods of Division of Expense.

(1) *Gross Earnings Basis.*

Several cases can be found in the lower courts where the gross revenue method of division of all expenses is resorted to. We have shown by the excerpt from Census Bulletin No. 21 that the resort to one or another of several methods for division of values as between states is a matter of very great moment in its effect upon value.

Because the margin of profit or loss is relatively less, the importance of a correct method of division of expense is equal or greater.

The application of the gross earnings method is deficient in that it assumes an harmonious relation of rates and movements, i. e., that both expenses and earnings proceed in company always normally. Now if there is any lesson taught by life, it is that it is the abnormal, the exception, which is frequently happening, that the normal or the absolute rule is the one thing which is seldom actually happening. For this reason, averages are delusive unless based on a groundwork sufficiently broad. In the absence of proof that earnings and expenses follow as cause and effect, this method of division must be wrong. In these cases not only is there a total lack of proof of the existence of the normal, but it is notorious that the years selected for the figures were all abnormal. That the fiscal year ending June 30, 1907,

was an abnormally great year in earnings; that the fiscal year, ending June 30, 1908, was because of the "bank panic," abnormally small; that the fiscal year ending June 30, 1909, continued to show the ill effects of October and November, 1907; that the fiscal year ending June 30, 1910, was amazingly profitable.

Not only so, but as we will show from the opinion of the Interstate Commerce Commission, local and long distance rates are not established upon a parity. There is no harmonious relation between them. If the gross earnings method is deficient in general, because of an assumption of harmony which does not exist, its deficiency for dividing as between intra and interstate commerce must be taken by the square root, because of the known lack of harmony of these rates among themselves.

Further, as we have just stated, the gross earnings measure, resting, as it does, upon the assumption of an harmonious relation existing between earnings and expenses, if there is no such harmonious relation, the measure is as inadequate as soft rubber for a yard stick. But if there is such a relation, what is it? When the Court examines the Arkansas case, as well as the Missouri case, it will note the great pains taken by the states to discover what, if anything, this relation is. Gentlemen stated under oath, but protected by the expression of opinion,

that they know a relation exists; yet they have never defined it. Do the witnesses measure the credulity of the Court by their own egotism? Will the law recognize not only as a fact but as a measure of other facts, a relation which no one has defined? Not only indefinable is it, but confessedly inaccurate, if ascertained. To apply it, Simon pure, in the nakedness of a scientific fact to a division of intra and interstate expenses, all railway operatives refuse. They say: this relation which we know exists, though we cannot define it, must, for the division between intra and interstate expenses, be corrected by an adjustment, because of the greater cost of moving intrastate as compared to interstate. What then is this adjustment?

The wide variance of opinion, from 10 *per cent to* 800 *per cent, proves not only its unreliability as a fact, but its worthlessness as a measure.*

It is asserted the gross earnings method, while confessedly inaccurate as a scientific proposition, may yet be depended upon under the rule of averages. (Judge Hook in M. K. & T. Ry. Co. vs. Love et al, 177 Fed. 493.) But this overlooks the scientific maxim that an average is the more unreliable as the instances are divergent. That the greater the difference between the normal and the occurence, the more abnormal the instance—to state a platitude.

"Practically scientific methods * * * ought to yield approximately the same results." Steenerson vs. Great Northern Co., 72 N. W. 713.

For these reasons the opinions of the lower courts following the gross earnings method lack convincing power. *This court has never followed that method.* With what consideration is was rejected by this court in Smyth vs. Ames, does not appear, but it does appear (pp. 529, 530, 531, 532, 534, 536, 538) that all the calculations were made upon the ton-mile basis. The concession was made in that case by the state that state freight in Nebraska would cost 10 per cent more per ton mile to handle than would interstate freight.

It will be noticed that all calculations made by Commissioner Lane *in re Investigation of Advances*, 20 I. C. C. 307, are upon the ton mile basis.

After a careful investigation in the Arkansas case, Judge Trieber in St. Louis Southwestern Ry. Co. vs. Allen, 187 Fed. 290, finds that the gross earnings method must be wrong. He says (p. 321):

"The straight revenue theory as advanced by the learned counsel and accountants of the railroads is clearly wrong, as for the intrastate traffic. No further proof of the fallacy of this theory is required than the examples and calculations of

the accountants for the railroads in the exhibits filed with their testimony. Mr. Nay, who, at the time he testified, had thirty-seven years' experience as a railroad accountant, having begun as a clerk of statistics and was at the time his testimony in these cases was taken, the comptroller of the Chicago, Rock Island & Pacific Railway Co., one of the great railroad systems of the country, gave the following illustration for the purpose of establishing the correctness of his theory and to controvert, as he states, 'an argument which is sometimes used to the effect that using the revenue basis is like traveling in a circle, and those who take that position claim that when the revenue of intrastate traffic is doubled the opertating expenses are also doubled and the end is just the same as in the beginning.' He thereupon gives the following illustration to demonstrate the fallacy of that argument, as he states:

"'First take for illustration a small railroad with freight operating revenue of $100,000 and freight operating expenses of $80,000, of which the intrastate freight traffic is $25,000 and the interstate freight traffic is $75,000. We have the following statement:

	Intrastate	Interstate	Total
Operating freight revenue	$25,000.00	$75,000.00	$100,000.00
Operating freight expense, divide the expense between the intrastate and interstate on a revenue basis and it would be as follows	20,000.00	60,000.00	80,000.00
Net operating freight revenue	$5,000.00	$15,000.00	$20,000.00

" 'Suppose that the rates on intrastate freight traffic are increased so as to exactly double the intrastate freight revenue, leaving the interstate freight revenue just the same, and the operating freight expenses exactly the same, an impossible condition in actual practice, but the extreme condition is used in order to emphasize the error of the argument that doubling the intrastate revenue in such a case would double the intrastate expenses. After doubling the intrastate freight revenue just mentioned we would have the following statement:

	Intrastate	Interstate	Total
Operating freight revenue	$50,000.00	$75,000,.00	$125,000.00
Operating freight expenses to intrastate revenue nearly 40 per cent of the total revenue, the operating expenses of $80,000.00 divided on the revenue basis would now be	32,000.00	48,000.00	80,000.00
Net Operating revenue	$18,000.00	$27,000.00	$45,000.00

"From this it will be seen that although the intrastate freight earnings were increased $25,000.00 after the intrastate tariff rates had been raised 100 per cent without any increase in expenditures, in the final result it is the beneficiary to the extent of $13,000 only, while the interstate earnings, with no increase in these rates, increased $12,000."

The inevitable result of the gross revenue theory is to state that if the state has no earnings then no expenses. That is, if the states did but place the rate low enough there would be no confiscation.

It is not an idle supposition that traffic can be carried

for nothing. Charity traffic such as that into San Francisco to relieve the earthquake victims was so carried. The goods of the company are carried free. Frequent tariffs have been filed where subsidiary companies had freight carried at one-half, etc. None of these things this theory observes. It is an impossible theory and obviously untrue.

Judge Farrington in the Nevada case, Southern Pacific vs. Bartine, 170 Fed. 725, shows that this theory is impossible.

Judge Brewer (Ames vs. Union Pacific, 64 Fed. 182) pointed out that obviously it would cost the same to move the traffic whether the rates were raised or lowered.

It is an offense against common sense to assert that there is any relation between earnings and expense. Yet many railway operatives testify to its existence. All that they can mean, in conscience, is that such a relation *ought to exist*.

It is capable of demonstration to a mathematical certainty that the gross earnings basis is absolutely fallacious. Under the gross earnings basis, which assigns the operating expenses, for instance, as between the freight and the passenger traffic on the percentage which the total gross earnings from each class of traffic bear to the total gross earnings within the state, the higher the rate in any particular class of traffic, the higher the assignable portion of the operating expenses to that traffic.

For the purpose of further demonstration, we will assume

that the total gross earnings of the railway company in any state amount to one million dollars and that this is contributed to equally by each class of traffic, which would make the total gross earnings from the freight traffic $500,000, and the total gross earnings from the passenger traffic $500,000. It is a well known fact that the operating expenses of any particular class of traffic do not increase in proportion to the increase in business. Instead of charging the rate for the transportation of freight under which this earning is produced, let us again assume that the freight rates are advanced 50 per cent, but, under the advanced freight rates the identical traffic is hauled which produced, under the old rates, a gross earning of $500,000 and we have an income under the new rate of $750,000 without one single item of increase in the operating expenses.

Assuming, now, that the rate of fares charged to passengers is reduced 50 per cent and identically the same amount of business is conducted under the same conditions, the same number of passengers hauled on the same number of trains for the same distances, and under the reduced rate, we have a gross earning in the passenger traffic of $250,000; yet, within the state, the total gross earnings from all classes of traffic is the same, or one million dollars. Let us now see what has been the effect of the increase in freight rates and the reduction of passenger fares upon the assignment of the operating expenses as between the freight and passenger traffic on the gross earn-

ings basis. We now find that the gross freight earnings bear a relation of 75 per cent to the total gross earnings within the state, and under the gross earnings basis 75 per cent of the operating expenses should be assigned to the freight traffic, and as the gross earnings from the passenger traffic under the reduced rate bear the relation of 25 per cent to the total gross earnings within the state, then the balance of the operating expenses, or 25 per cent, would be assigned to the passenger traffic. It must be borne in mind that during this period, while the increased freight and the reduced passenger rates have been in effect, there has been absolutely no change whatever in the operating expenses of either class of traffic. The same trains have been operated and between the same points; the same identical amount of freight has been hauled at the same identical expense; the same number of passengers have traveled in the same number of trains for the same distances at the same identical expense as during the time when the highr rates were in effect; yet, under the gross earnings basis, without any effect whatever on the actual operating expenses, the proportion of operating expenses has been increased from 50 per cent to 75 per cent in the freight traffic, and has been reduced from 50 per cent to 25 per cent in the passenger traffic.

Again, we will assume, for the purpose of illustrating, that the total gross earnings for the freight traffic are $500,000.

Under this state of facts let us assume that the passenger

fare is raised from three cents to ten cents per passenger per mile, and while this higher rate is in force for, say, a period of one year, the same number of passengers are carried under the same conditions, on the same trains, for the same distance, so that there is no difference whatever in the actual operating expenses, insofar as it is applied to the operating of passenger trains. With the same number of passengers, at the increased rate of 10 cents per passenger per mile, we have increased the gross earnings of the pasenger traffic over the present rate three and one-third times, so that the revenue derived from the passenger traffic is now $1,666,666.67. The gross earnings from the freight traffic remain the same. By reason of the increased rate, the gross earnings from the passenger traffic are now three and one-third times what they were before the increased rate went into effect, with the consequent result that the advancement of the rate raised the percentage which the total gross passenger earnings within the state bears to the total earnings, and to that extent assigns the greater proportion of the operating expenses to the passenger traffic without, as a matter of fact, making one single dollar's difference in the true expense.

Again, let us assume that during the time of the inquiry the gross earnings from all classes of traffic remain at one million dollars, and under a three-cent rate then in effect the earnings from the freight and passenger traffic are $500,000 each. We will now reduce the rate on the passenger traffic from

three to one cent per passenger per mile, assuming that no greater number of passengers are carried. What is the result? Under this reduced rate of one cent per passenger per mile, exactly the same volume of traffic is conducted for the year as when the three-cent passenger fare has been in effect. The same number of trains have been operated at the same identical expense, and the same number of passengers have been carried the same distances. There is no actual change in the expense of operating the passenger business during the year that the one-cent rate has been in effect from the operating expense during the year while the three-cent rate was in effect, but the income has been reduced two-thirds. The income from the passenger traffic under this one-cent rate is now $166,666.67, while the freight traffic remains at $500,000. Under the gross earnings method the proportion of the gross earnings from the passenger business is about 25 per cent of the total gross earnings in the state, and the effect of this would be to assign to the freight traffic 75 per cent of the operating expenses and to the passenger traffic 25 per cent; but, as a matter of fact, in the actual operating expenses, as between the two classes of traffic, there would be no change whatever.

Again assuming that during the period covered by the inquiry the gross earnings from the freight traffic remained at $500,000, and the passengers were carried free of charge, but the same number of trains were run the same distance, and

the same number of passengers were carried for the same number of miles; under this method, whereby passengers were carried free of charge,, there would be no gross earnings in the passenger traffic and, consequently, all of the operating expenses in the particular state would be assignable to the freight traffic and there would be no operating expenses assignable to the passenger traffic. We submit that the foregoing illustrations demonstrate that the gross earnings basis is a mathematical absurdity.

The tendency of an unjust rate under the gross earnings basis would be to perpetuate itself, and a rate which is too high and producing too much revenue will by the very fact that it contributes to the gross earnings also add to its own expense; a rate which is so low as to be non-remunerative will, by the very fact of its use in the gross earnings, enable it to fasten itself upon the other paying business of the road as a leech and to draw from the business its expenditures at the expense of the other buiness.

2. *How Far Is Relation Between Expense and Receipts Variable?*

For the purpose of determining how far the relation between expense and receipts is an actuality, we have prepared the following tables for two fiscal years, 1908, 1909, on the A. T. & S. F., Northern Pacific and C. B. & Q. systems,

showing the monthly receipts, expenses, and relation between them.

If there is a relation or even the approximation of a relation, on a rule of averages covering so wide a field, it could be expected that the ratio would be fairly *constant*, and that the expenses and receipts would at least inevitably move in the same direction at the same time. If these expectations are not realized, the testimony as to the relation is incredible. The facts are these:

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY

1907	Fiscal Year 1908 Operating Revenues	Operating Expenses	Ratio	1908	Fiscal Year 1909 Operating Revenues	Operating Expenses	Ratio
July	6,621,547.69	+4,214,512.83	63.17		+5,761,474.83	+3,495,724.09	60.67
August	+6,693,949.19	+4,459,731.42	66.59		+6,090,216.48	+3,682,496.69	60.46
September	—6,611,185.15	—4,403,646.94	66.51		+6,375,498.60	+3,851,151.90	60.40
October	+7,092,001.53	+4,841,920.41	68.27		+6,510,778.94	+4,122,874.62	63.32
November	—6,598,146.96	—4,792,555.74	72.63		+6,638,401.82	—4,001,750.59	60.28
December	+6,622,530.46	—4,375,614.26	66.07		—6,551,190.89	—3,556,172.43	54.28
1908				1909			
January	—6,052,646.57	—4,219,183.18	69.71		—6,063,475.00	+3,707,438.27	61.14
February	—5,594,391.39	—3,450,282.48	61.67		—5,923,093.59	—3,549,505.77	59.92
March	+6,280,620.48	+3,531,139.41	56.22		+6,931,517.13	+3,808,193.31	54.94
April	—6,280,306.41	—3,524,562.02	56.12		—6,598,246.21	—3,756,862.72	56.93
May	—5,671,183.76	—3,355,141.41	59.16		+6,645,052.60	+3,935,557.54	59.22
June	—5,405,871.75	—2,808,597.72	51.95		+6,681,722.01	—3,914,159.53	58.58

Bulletin No. 5 of the Revenues and Expenses of Steam Roads in the United States ending June 30, 1908, and 1909, page 45.

NORTHERN PACIFIC RAILWAY COMPANY.

1907	Fiscal Year 1908 Operating Revenues	Operating Expenses	Ratio	1908	Fiscal year 1909 Operating Revenues	Operating Expenses	Ratio
July	7,132,765.83	3,956,347.41	55.46		5,679,525.08	3,133,087.84	54.68
August	—6,996,984.85	—3,946,928.90	56.41		+5,836,668.03	+3,235,372.62	55.43
September	—6,591,931.57	—3,871,749.85	58.73		+6,800,961.82	+3,267,378.49	48.04
October	+7,001,381.53	—3,774,704.02	53.91		+7,269,067.01	+3,540,452.51	48.70
November	—6,717,277.89	—3,542,572.10	52.74		—6,418,352.44	—3,114,471.48	48.52
December	—6,128,262.50	—3,262,329.80	53.23		—5,640,601.46	—3,021,868.63	53.57
1908				1909			
January	—4,432,215.09	—2,778,982.51	62.70		—4,147,390.01	—2,977,114.83	71.80
February	—3,944,997.34	—2,484,053.69	62.96		+4,309,818.78	—2,712,862.94	62.94
March	+4,732,449.38	+2,538,125.31	53.63		+5,477,835.70	+2,820,070.64	51.48
April	+5,198,620.99	+2,947,710.27	56.70		—5,280,862.34	+3,113,533.88	58.96
May	—5,103,091.89	—2,908,954.37	57.00		+5,451,967.62	+3,463,983.51	63.53
June	—4,240,693.36	+3,828,225.71	90.29		+6,147,696.92	+3,649,807.28	59.37

Bulletin No. 5 of the Revenues and Expenses of Steam Roads in the United States, years ending June 30, 1908, and 1909, page 166-7.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY.

1907	Fiscal Year 1908 Operating Revenues	Operating Expenses	Ratio	1908	Fiscal Year 1909 Operating Revenues	Operating Expenses	Ratio
July	6,893,942.05	4,382,054.11	63.56		6,271,163.36	4,237,614.72	67.57
August	+7,553,214.00	+4,788,493.15	63.39		+6,918,604.17	+4,435,125.44	64.10
September	+7,892,931.43	+4,882,894.31	61.86		+7,349,378.10	+4,520,227.75	61.50
October	+8,270,655.61	+5,332,091.86	64.47		+7,688,451.35	+4,864,063.14	63.26
November	—6,764,384.60	—5,104,799.68	75.46		—6,632,676.06	—4,662,342.76	70.29
December	—6,147,968.26	—4,782,595.71	77.79		+6,742,322.05	—4,386,332.36	65.05
1908				1909			
January	—5,766,083.08	—3,997,422.24	69.32		—5,807,989.15	—4,007,290.11	68.99
February	—5,205,865.47	—3,712,646.27	71.31		—5,719,427.57	—3,794,492.04	66.34
March	+6,255,194.13	+3,951,767.42	63.17		+6,861,502.63	+4,385,743.06	63.92
April	—5,686,976.83	+4,978,588.48	87.54		—6,054,598.67	+4,987,545.14	82.37
May	—5,567,591.87	—4,718,225.30	84.74		+6,139,750.39	+5,100,477.72	83.07
June	+5,743,354.19	—4,636,728.95	80.73		+6,426,765.86	+5,255,543.53	81.77

Bulletin No. 5, of the Revenues and Expenses of Steam Roads in the United States, years ending June 30, 1908, and 1909, pages 68-69.

It is seen that during the fiscal years variances in the ratio occurred as follows:

	1908	Ratio of Expense to earnings
A. T. & S. F.	Maximum, November, 1907	72.63
A. T. & S. F.	Minimum, June, 1908	51.95
Northern Pacific	Maximum, June, 1908	90.29
Northern Pacific	Minimum, November, 1907	52.74
C. B. & Q.	Maximum, April, 1908	87.54
C. B. & Q.	Minimum, September, 1907	61.86
	1909	
A. T. & S. F.	Maximum, October, 1908	63.32
A. T. & S. F.	Minimum, December, 1908	54.28
Northern Pacific	Maximum, January, 1909	71.80
Northern Pacific	Minimum, September, 1908	48.04
C. B. & Q.	Maximum, May, 1908	83.07
C. B. & Q.	Minimum, September, 1908	61.50

Can these be described as "fairly constant?" They range from 90 per cent to 52 per cent; they can only be said to be over 50 per cent and less than 100 per cent. Certainly expenses and receipts do not move at the same pace.

Further, it will be noticed that in the fiscal year 1908 on the A. T. & S. F. in December, on the Northern Pacific in October and June, on the Burlington in April and June, the expenses and receipts did not move in the same direction at the same time.

In 1909 on the A. T. & S. F. in November, January and

June, on the Northern Pacific in April, on the Burlington in December and April, the expenses and receipts did not move together and simultaneously.

(*Note.*—This method of proving the lack of harmony between receipts and expenses was suggested to the writers by Professor B. H. Meyer, then of the University of Wisconsin, in May, 1910. The idea is his, the working out of it, only, ours.)

Certainly expenses and receipts neither move together in the same direction at the same *time*, nor at the same *pace*. Their relation is a rope of sand.

3. *Revenue Train Mileage Basis.*

On this basis it is asserted that the operating expenses should be assigned to a state in the proportion that the revenue train mileage within a state bears to the revenue train mileage of the system; and that as between different classes of traffic, i. e., freight and passenger, in the proportion that the revenue train mileage of each class bears to the whole revenue train mileage of the state. In some instances the revenue train mileage method of apportionment is applied to the common or unallocated items.

The use of the revenue train mileage basis has a tendency to load the operating expenses onto the passenger traffic. The two classes of traffic do not represent the same thing, nor is the expense of conducting them the same. The use of the

revenue train mileage basis presupposes a similarity in the nature and expense of the two classes of traffic. The expense of a revenue freight train mile greatly exceeds that of a passenger train mile. The expenses of conducting a revenue freight train within a state and upon the system are not the same, and this is likewise true of a revenue passenger train. Again, this basis takes no account of switching mileage, which is almost entirely a freight item. Without including the switching mileage with the revenue train mileage, the passenger traffic is charged with the expense of switching freight trains. There is no similarity in the two classes of traffic. The average number of cars per revenue freight train mile within the state is not the same as upon the system, nor is the average number of passenger train cars within the state the same as upon the system. The revenue freight train miles in the state do not bear the same relation to the revenue freight train miles on the system that the revenue passenger train miles in the state bear to the revenue passenger train miles on the system. The expense of conducting the revenue freight train miles is greatly affected by the volume of traffic and the density of population. In some states the average number of cars in a revenue freight train do not exceed ten to twelve, while in other states and in trans-state revenue freight trains the average number of cars exceeds forty. This same difference in the number of cars is true as to passenger traffic as well.

In Buell v. C. M. & St. P. Ry., *supra*, Mr. Commissioner Meyer, in discussing the use of the revenue train mileage basis says:

"For the apportionment of the common expenses between passenger and freight several methods have been suggested and used. In some cases the common items have been distributed on the basis of the direct expenses, or on that portion of the expenses which allot themselves between the two classes of traffic, or which can be so allotted on some sound and fair basis. In other cases, again, the division is made in proportion to the respective revenue train mileage in the two departments. In still other cases the apportionment is made on the basis of the gross earnings. In other instances the apportionment is based on some modification of these units, and some other unit different from any that has been mentioned. * * * *

"The revenue train mileage, as stated before, has often been used as the basis upon which not only all the common expenses, but also a large proportion, if not all, of the direct expenses have been apportioned between passenger and freight. Whether this method is fair depends entirely upon whether the two classes of mileage, mile for mile, represent the same thing. If the passenger train mile costs as much as the freight train mile, if the direct outlay in both cases are the same, then this mileage may be a safe and fair basis upon which to apportion the indirect or common expenses between the two classes of traffic. If, on the other hand, the direct outlays per train mile are much greater in one case than in the other, then it would certainly seem unfair to so distribute the common expenses that they would be shared equally per train mile by both classes of traffic.

"It is a well known fact that passenger train mileage is less expensive than freight train mileage. The former is made much more rapidly. Passenger cars and passenger locomotives

make a great deal more mileage during the year than freight cars and freight locomotives. Being made more rapidly it also follows that the passenger train mile costs less for repairs, fuel, locomotive and train service than is the case for the freight train mileage. The cost per train mile for the train service, for instance, is only about one-half as great for passenger as for freight trains. The difference in the cost of locomotive service and fuel are about as great. In the case of repairs of equipment, loss and damage to freight and baggage, hire of equipment balance, switching balance, the cost of switching, and of many other items which depend more or less directly on the train mileage, the cost per freight train mile is often several times as great as the cost per passenger train mile. When the expenses which are not dependent upon the train mileage, such as station service and other items of importance are considered, the situation is not greatly changed. There are a few items of minor importance under maintenance of way and under conducting transportation of which the cost per train mile is as great in the passenger as in the freight service. The cost per revenue train mile of the direct expenses is, on the whole, much greater for freight, and the revenue train mile should, therefore, not be generally used in making the apportionment of expenses between the two.

"Sometimes the switching mileage, which, as stated before, is practically all freight mileage, is included in the revenue train mileage when this mileage is used as the basis upon which to separate expenses between passenger and freight. This is an important modification of the train mile basis, and the change would, on the whole, tend towards a fairer division. The switching mileage is partly revenue train mileage and partly non-revenue train mileage. The greater proportion of it is probably employed in making up trains and for picking up and distributing cars, for which no extra charge is made; but a considerable proportion bears an extra charge. The switching mileage, as a whole, is costly. It added materially to the expense of conducting the freight traffic.

"Among the expenses for which switching is either entirely or partly responsible, is the cost of the maintenance of yard tracks and of the main tracks, at stations and other places where such tracks are used for switching. Fuel, locomotive and train service and expenses, car and locomotive repairs, switchmen, flagmen, superintendence of operation, telegraph expenses, loss and damage, personal injuries, stationery and printing, and other items can be charged in part directly to switching, while the rest must be arbitrarily apportioned.

"Those which can be more or less completely separated and charged against switching are fuel, locomotive service, expenses and repairs, switchmen and certain other items. Among those which cannot be separated are the cost of maintenance of tracks, superintendence, telegraph service and other items.

"As has already been said, switching expenses are practically all a freight expense, and should, therefore, be included in the cost of the freight traffic. That part of the switching expenses, which is, or can be, kept separately, may be directly added to freight. That part of the switching expenses, again, which is not separable, but is included in items which are common to the traffc as a whole, will either have to be arbitrarily separated and then added to the freight or, if this is not practical, the units upon which the expenses are apportioned between passenger and freight, will have to be so adjusted as to cause the cost of the freight traffic to be increased by an amount that approximately corresponds to the cost of switching.

"The question at this point is, therefore, how can the common expenses be so apportioned that the freight traffic will be made to bear not only its own cost, but in addition to this the cost of switching? An apportionment of these expenses between passenger and freight in the proportion which the two classes of the revenue train mileage, with switching mileage excluded, bears to the total revenue train mileage, will not lead to this result. Under this method each passenger train mile

is made to bear exactly the same amount of switching expenses as each freight train mile. This is manifestly not fair, for switching is a freight expense and should be charged to freight. No basis of division can be fair which does not take account of this."

Have we not demonstrated the fallacy and the utter unreliability of both the gross earnings and the revenue train mileage bases for the assignment of expenses and the apportionment of value? Can the inquiring mind, intent upon the proper solutions of these questions, accept either of these methods of division and adopt them in the face of the foregoing illustrations? We think not. We believe we have shown that the use of either of these factors will not even approximate a fair result.

(c) Correct Methods of Division.

The first attempt to reach a correct method of division, so far as we know, is contained in the case of Buell vs. the C. M. & St. Paul Railway Company, decided by the Wisconsin Railway Commission, February 16, 1907, the decision being by Professor Meyer, now of the Interstate Commerce Commission. It will be noticed that upon the whole that Professor Meyer was then of the opinion that the adoption of any one method for every item of expense was a mistake, and an attempt should be made to find some measure which would as

a matter of causation, be in some way connected with the expense. Or, if not by causation connected, that it should in some some other way be connected with it, so that logically it would afford a measure of reasonable stability.

Some months later, in October, 1907, Professor Meyer, before the meeting of the National Association of Railway Commissioners, had occasion to discuss the same questions a second time. What he has to say will be found on page 103, and following, of the publication of the proceedings of the National Association of Railway Commissioners for the year 1907. Discussing cost accounting, he says:

"This is cost accounting in industrial enterprises. The last ten years especially have seen great strides made in this branch of accounting, and a voluminous literature has been produced which deals with every detail of practically every business. The nature of many of the great manufacturing plants of today is very much like that of a railway in the matter of direct and indirect or common expense, the latter of which have thus far been the effective block against progress in rational cost accounting in the railway business. The railway business is today the only great business in which cost accounting does not receive proper consideration, although every other branch of railway accounting has been well developed. This means that present-day railroading is not run on a sound business basis nearly as much as it should be. In the past railways have been operated much like a country store. At the end of the year all the bills are paid and some money is left over; or, if the bills cannot be paid, the store goes into the hands of a receiver. The country merchant generally sells on 'judgment' and 'intuition,' hoping that in the general turnover he will

come out ahead. Similarly, the traffic agent gets business at such rates as he can get—or he used to do so—with nothing except 'judgment' and 'intuition' to tell him whether such a rate will pay or not. It may sometimes be necessary to get traffic at a very low profit, but how many traffic agents know whether the business they are gettingg yields any profit whatsoever or an excessive profit?

"In short, my first thesis is that it is imperative that the cost of transportation should be ascertained for each branch of the railway business separately and for each important class or commodity within the branch. This is necessary from every point of view, especially from that of good business methods.

"The separation of expenses between the passenger and freight branches of the business can be accomplished, actually, as is well known, only to a certain extent, say 55 per cent of the total for most railways. The balance must be separated upon more or less arbitrary bases. Whichever basis may be selected will not be mathematically accurate, yet for all practical purposes, the separation can be made accurate and a sound judgment based thereon. Generally speaking, each item of expenditure should be assigned on the basis of that unit which most accurately measures the service for which it is performed. For some items it may be necessary to use different units on different railways. Nothing but a careful study of each railway business and property can determine this."

In this connection we desire to call the court's attention to the views of the Interstate Commerce Commission, expressed by Mr. Commissioner Lane on February 22, 1911, especially at pp. 357-367. In this opinion Mr. Commissioner Meyer concurred.

One of the authorities mentioned by Professor Meyer in

the Buell case, which presents perhaps the clearest discussion is the work "Transportation by Rail" of T. M. R. Talcott, C. E., published by Whittet & Shepperson, Richmond, Virginia, 1904.

He points out (p. 9) that a railway both maintains a highway and transports persons and freight over it. That the maintenance of the highway is independent of its use, i. e., a fixed expense.

That the terminal and station service is independent of the distance the traffic goes.

And that thus there are three services:

(1) The highway;

(2) The terminal or station use;

(3) The transportation.

He points out (p. 12):

1. Administration—

   This expense is neither a part of nor proportionate to the "Transportation Service"; it is a cost to be distributed over the entire length of the road.

2. Maintenance of Ways and Structures—

   In proportion to number and miles of track. The abrasion of the track proportioned chiefly to the gross ton

mileage. (Weight of freight or passengers, together with train performing transportation.)

3. Taxes—

Ought to be in proportion to length of road and number of tracks.

4. Terminal Charges—

Are in proportion to number of passengers and tons irrespective of distance they go. (p. 13.)

5. Transportation Service—

Depends on volume as well as distance and character of of service, i. e. passenger and freight, etc.

Recapitulating he says: (p. 15.)

"We have different kinds of service classified in relation to conditions which influence their cost as follows:
"First. Service, the cost of which is not materially influenced, if at all, by the volume of the traffic or the distance it is hauled, viz:

Administration.

Maintenance of Roadway, Structures and Buildings.

Second. Service, the cost of which depends upon the volume of the traffic, but not upon the distance it is hauled, viz:

Terminal and station expenses—Passenger.

Terminal and station expenses—Freight.

Third. Service, the cost of which depends on both the volume of the traffic and the distance it is hauled, viz:

Train mileage—Passenger.	Car mileage—Freight.
Train mileage—Freight.	Gross ton mileage—Passenger
Car mileage—Passenger.	Gross ton mileage—Freight."

(d) Extra Cost Theory.

It will be noticed that the supposed extra cost of state over interstate business is rather testified to than proved.

It arises from the confusion of "local" with "intrastate" and "through" with "interstate." Yet it appears very clearly in the Missouri and Arkansas cases that the great bulk of the service of local, way or peddling trains is interstate business, and a large part of the service of the through trains is intrastate, hauled from division point to division point.

(Note.)—No more precise definition than the above can be suggested. Railroads operate by division as units. Trains and crews that proceed from one to the other end of a division without change of formation or load are through trains, all others are local, way or peddling trains. Trains scheduled as through may in an emergency, or for rush or time freight, do often perform local service as in setting out or picking up a load.

The evidence of the railways is a trackless waste, a puzzle.

If we could take their opinions in lieu of evidence we might gulp it down, though we cannot digest it.

Judge Farrington, in 170 Federal, at page 752, states the proposition properly when he says:

"Now it is only as to the conducting transportation that the cost is claimed to be greater for local than for general traffic. Other items of expenditure are constant. They are practically the same for all kinds of traffic."

Then he cites numerous cases in which this theory has been discusses, and closes with these words:

"No particular ratio can be established as a matter of law. The relative cost of domestic and interstate traffic must depend always upon the peculiar facts of each case. Of the freight which is shipped, carried and delivered wholly within the state, much may be transported by what is practically a through movement; that is, by fully loaded trains, taken without interruption to their destination from the starting point. And, on the other hand, much interstate freight originating out of the state may be carried by what is essentially a local movement; that is, it may be distributed by way trains at various stations after it reaches the state."

We think that the evidence plainly shows that the condition described by Judge Farrington in the last paragraph and the last words, is the condition existing.

That the extra cost can exist only under conducting transportation and cannot be extra under all heads, appears from the consideration that more than one-half of all railway ex-

penses are independent of whether the traffic moves or not. It must follow that it is independent of whether it moves intra or interstate.

Judge Noyes, in his book on American Railroad Rates, Boston, 1906, at page 17, prepares the following table of railroad expenses as to what are changeable and what are constant. After having made an examination of the various railroad expenses, he says:

"Using this examination of the outgoings of a railroad as a basis, we may prepare a table separating expenditures into those which are constant and those which are fluctuating. The following table so arranges the figures already obtained; but, like the figures themselves, is rather an illustration of the principles involved than a statement of technical accuracy."

He says (on page 12) that fixed charges, that is, interest upon the funded and floating debts, taxes and rentals, and for the sinking fund, if there be one, amount to about 25 per cent of the entire outgoings; that the general expenses (page 13) amount to about 3 per cent of the total expenditures; that the percentage of maintenance of way and structures is about 16 per cent on the railways in the United States; that the maintenance of equipment is about 14 per cent; (on page 17) that the conducting transportation upon the average railroad in the United States in recent years takes about 42 per cent of the total expenses. The following table divides these expendi-

tures into the two classes of constant and fluctuating:

Class of Expenditure	Proportion of Constant Expenses to Total Expenditures.	Proportion of Fluctuating Expenses to Total Expenditures.	
Fixed Charges	25		
General Expenses	3		
Maintenance of Way and Structures	10	6	
Maintenance of Equipment	7	7	
Conducting Transportation	14	28	
	59	41	100

We can, therefore, figure that the following charges are constant: Fixed charges, 25 per cent; conducting transportation, 14 per cent; the general expense, expense of maintenance of way and structures, and equipment, 20 per cent; that is, 59 per cent is incurred whether a wheel moves or not. If a wheel moves, there is to be added to this a further 6 per cent for the maintenance of way and structures, 7 per cent for the maintenance of equipment, and 28 per cent for conducting transportation. We must, therefore, reach the conclusion that 59 per cent, or more than half the expenses of the intrastate traffic is entirely uninfluenced by how far the movement is had or whether the movement is all low grade

handling terminal or not handling terminal—in fact, all the factors named in the case in 176 U. S. 167, and the other or high grade commodities, carloads or less than carloads, cases recognizing the same principles, which are gotten together on page 752 of 170 Federal, by Judge Farrington. All these factors are absent from the consideration of the 59 per cent. The only difference that there can be is in the other 41 per cent.

These views of Judge Noyes are supported by the statement of Commissioner Lane, 20 I. C. C. R., p. 357-8, that about 50 per cent of all operating expenses is conducting transportation, 25 per cent maintenance of ways and structures; 25 per cent maintenance of equipment; that 50 per cent of expenses of conducting transportation "is easily segregated." "Thus, practically 75 per cent of the entire expense (of operation, he means) is taken care of. The expense of maintenance of ways and structures cannot be allocated, and this has to be divided arbitrarily."

On page 363 of the same opinion, W. M. Acworth, the leading English authority on railway economics, is quoted to this effect:

"Expenses increase as traffic increases, but by no means in direct proportion. Certain expenses—for instance, main-

tenance of works—hardly increase at all; others—for instance, terminal handling of goods at big stations, where the staff can be normally kept fully employed—increase almost as fast as the traffic. The bulk of the expense is intermediate between these two extremes. On the whole, a common and probably roughly accurate estimate is to say that half of the total expenses is fixed; half varies with the traffic. That is to say, if it costs X to deal with 1,000,000 units of traffic, 5,000,000 units will cost not 5x, but $\frac{1}{2}x+(\frac{1}{2}x\times5)=3x$."

To the same effect Commissioner Lane quotes Mr. Ripley of the Santa Fe. See 20 I. C. C. R. p. 367:

"A very large proportion of the expenditures of a railroad remain fixed, notwithstanding that there might be a large decrease or a large increase in the earnings. Many of our expenses are not affected by our increase and there is hardly any year that we could not increase our earnings $10,000,000 without increasing our labor more than a small fraction of that. We do not employ, as a rule, when we have a large increase in our earnings, any additional help as to a large portion of our business; it takes more engine men and more trainmen and more men in the operating department and some additional help at stations, but not very much more, and it is notorious that we can increase our earnings ordinarily enormously without increasing our ratio of expense proportionately. That ought to be the case, but in the last two or three years everything has been against us. We can probably increase our earnings $10,000,000 next year, or at least we could without expending more than $2,000,000 additional for labor."

If this be the truth, as we think it is, common sense is offended by measuring expenses by earnings, and especially by

arbitrarily increasing the earnings on state business fifty per cent or one hundred per cent, or any per cent, for the purpose of measuring the state expense. That such testimony should be rested on to nullify the act of a sovereign state when dealing through its police power with a matter like transportation affecting the very lifeblood of commerce, dwarfs understanding.

Talcott points out that administration expenses and taxes and fixed expenses are independent of traffic (pp. 12, 13 and 17) terminal expenses independent of length of haul (pp. 9 and 13) transportation expenses, but partly dependent on volume of business.

He says (p. 75), that a rough but fairly accurate rule of relating local and distance rates in proportion to expense of traffic is to apportion rate per ton proportionate to the square root of the distance.

An extra charge for intrastate business is also inconsistent with Mr. Peabody's "Scientific Basis" for railway rates. His is a graduated class and distance scheme.

(e) Reductio ad Absurdum.

If State Traffic costs 50 per cent Extra it Can Never Move Traffic Profitably.

In the Missouri and Arkansas cases there is testimony of Mr. Doddridge (pp. 81 and 84 of the record in the Arkansas

case) that if intrastate rates were put on a compensatory basis, they would be prohibitve; and further, that it is impossible to have any state regulations, in view of his opinion, as to the cost of intrastate traffic. He says that for commercial reasons the railroads would not adopt a tariff that would be prohibitive but that state regulations could not get a tariff high enough to be compensatory, therefore there could be no state regulations of intrastate rates.

Irrespective of this statement, it but needs to be stated to demonstrate itself that if state rates were fifty per cent higher than competing interstate rates, the state rates will not move traffic. Business cannot compete with a fifty per cent handicap. And if it could it would be against public policy to allow such a discrimination.

Railways owe their first duty to the communities through which they run. L. S. & M. S. Ry. vs. Ohio, 173 U. S. 301, *et seq.*

Competition in business knows no state lines and neither should rates. The state line can have no influence upon the expense, else before November 16, 1907, when commerce from the Indian Territory to Oklahoma Territory was interstate, it was less expensive than after November 16, 1907, when it was intrastate.

Furthermore, if it is true that state business costs 50 per cent more than interstate of the same distance and kind, then rates which will move intrastate business will never be compensatory. In fact, in the Oklahoma case, Mr. Peabody testified that in his judgment all state-made rates west of the Mississippi were confiscatory. This will be the necesary result wherever state traffic costs 50 per cent more to move than interstate.

It may be confidently asserted that the cost of operation is at least more than 50 per cent of the income of operation. (See table of Revenues and Earnings, A. T. & S. F., Northern Pacific and C. B. & Q. above, between 52 and 90 per cent.)

If 50 per cent be accepted as the minimum figure of cost of operation, then the minimum figure of cost of operation on state made rates upon the theory of 50 per cent extra for state business will be 75 per cent of earnings.

But fixed charges will always be more than 25 per cent of earnings.

The very excellent work of Carl Snyder, American Railways as Investments, the Moody Corporation, New York, 1907, on page 60, says:

"No matter how high the yield, no investor whose primary regard should be the safety of his money will put it into a road whose fixed charges, after ample charges for maintenance,

consume more than fifty per cent of the total net income available for interest, dividends and improvements—that is, save in exceptional cases, like the New York Central—and until he has satisfied himself thoroughly that the property is sound.

"For the convenience of those not well acquainted the following list of the principal roads is given, with the percentage of total net income consumed by fixed charges in the highly prosperous year of 1906.

"For the year 1906:

Atchison, Topeka & Santa Fe	42 per cent
Chicago & Alton	73 per cent
Chicago & Eastern Illinois	68 per cent
Chicago & Northwestern	39 per cent
Chicago, Burlington & Quincy	45 per cent
Chicago, Great Western	67 per cent
Chicago, Mil. & St. Paul	32 per cent
Colorado & Southern	55 per cent
Denver & Rio Grande	52 per cent
Illinois Central	47 per cent
Kansas City Southern	54 per cent
Louisville & Nashville	54 per cent
M. K. & T.	75 per cent
Missouri Pacific	60 per cent
Northern Pacific	29 per cent
Pennsylvania	38 per cent
Rhode Island	83 per cent
St. Louis & San Francisco	82 per cent
St. Louis & Southwestern	76 per cent

Southern Pacific	49 per cent
Texas & Pacific	40 per cent
Union Pacific	31 per cent
Vandalia	54 per cent
Wabash	80 per cent

Then 50 per cent (minimum operating cost) +25 per cent (state extra cost) + 25 per cent (minimum fixed charge) + x (whatever fixed charge will exceed 25 per cent operating income) = 100 per cent + x, i. e., it will cost more than $1.00 to earn each $1.00.

There is no reasonable doubt that if we accept as a fact an extra 50 per cent of expense intrastate as compared to interstate we must agree with Mr. Doddridge and Mr. Peabody in saying that not only all the state made rates west of the Mississippi would be confiscatory, but all the state made rates everywhere would be so. They would have to be so. A result so unreasonable precludes the truth of the extra cost theory.

Commissioner Prouty's answer is admirable, 20 I. C. C. 253:

"But, however, all this may be, a fundamental economic fallacy underlies the proposition that we should permit rates otherwise unreasonable for the purpose of bolstering up the credit of our railways. It would be much better for the Government to guarantee these bonds than to permit the people and

the industries of this country to bear the burden of unreasonable transportation charges."

(f) Cause of Extra Cost.

If there is a definable difference between the cost of doing local as distinguished from through business, it should be shown what part of the local is state and interstate, and what part of the through business is of each character. That an accurate knowledge of this may be gained is apparent from what was done by the state authorities in the Missouri, Minnesota and Arkansas cases. Further, it should be shown what part of the state local and state through is affected by the state made rates and what part by rates voluntarily made by the roads. That this can be done is shown in the Oklahoma case. There the M. K. & T. submitted a statement for a year, of each ton of freight moving under an order of the state commission. The next requirement would be to discover whether the tonnage moving on the state made rate was such as must move on that rate or such as could be avoided by the road. What is meant is that in some states, notably Oklahoma, the longer of two lines between the same points is not compelled to carry the traffic. If it accepts it, the result is voluntary. After all elements of guess or the result of all voluntary acts is removed, there remains the question whether as a matter of public policy it is proper to charge the state with

extra cost on any business. How did this extra cost arise? In two ways. First, economies of operation practicable on through business but to a less extent on local; for instance, all economies on services that are independent of the length of haul will be greater per ton per mile on long distance than local traffic; i. e., terminal and station expense (Talcott, p. 15); to a less extent, service, the cost of which is not materially influenced, if at all, by the volume of traffic or distance hauled; administration, maintenance of road (Talcott, p. 15), will be less per ton per mile on long distance than on local; but the service, the cost of which depends on both the volume of the traffic and the distance hauled, train mileage, car mileage, gross ton mileage (Talcott, p. 15) must be about the same per ton per mile.

Second: Extra cost is put upon all non-competitive traffic by the especial facilities furnished competitive traffic. The local traffic should not be charged with this.

For instance, at first, after construction, a mixed train is operated over the road carrying all traffic, both passenger and freight, local and through, intra and interstate. No one will claim that on it any such distinction could be found as that claimed by the roads in these cases.

Next, growth of business causes the road to divide its

business into passenger and freight trains and mixed trains. Or, perhaps, it is a public duty compels this division. If an absolute public duty, no inquiry need be made whether it makes or loses money. (Kan. vs. Mo. Pac. 216 U. S. 262). If not a public duty, but the demands of business compel the division into passenger and freight, how can any inquiry be had into the cost results of a voluntary act?

Later, the business growing in volume, division is made between local and through trains, passenger and freight or both. This is for the same reasons as before and should be followed by the same results.

But the fast through trains leave the peddling of freight and passengers both for and from them to be done between division terminals by the way trains, passenger and freight; compel the way trains to stand on side tracks for the fast through trains to pass; compel the employment of advertising and soliciting outside agencies, palace stations, lofty buildings and deep tunnels that operate solely on and for competitive business. Should the expense of the service the way trains perform for the through, the disservice, nonservice, poor service, want of service on the way trains, brought about that the fast trains may hurl by with safety, speed, precision and profit—shall all this caused by the through business be charged not to it, but to the poor hewer of wood and drawer of water

among trains, the way train? The way train, even the mixed way train operated over the newly constructed road needed no through train, no tunnels, no magnificent stations, no such granite road bed, no block signals, no such monster engines, no safety appliances, no lofty buildings, nor hustling agencies, no such multitude of passing side-tracks, nor all the multiplied panoply of modern railway ingenuity.

The through train caused them. It should pay for them.

D.

NOTORIOUS FACTS OF WHICH COURT WILL TAKE JUDICIAL NOTICE.

(a) Historically, Unreasonable Discrimination Against Local Rates is Cause of Controversy.

A readjustment of almost impossible traffic conditions is the object sought by the states. The prevention or delay of that readjustment is the object sought by the roads. The latter accuse the states of confiscation of their property, in what is asserted to be an attempt to compel transportation for less than fair compensation; the states accuse the roads of

confiscation of their development and the property of the shippers by what they charge as an attempt to extort for transportation today, under modern facilities, the transportation prices of thirty years ago.

Complication herein is caused by the discrimination alleged to exist against intrastate rates in favor of interstate rates, and what is claimed to be the very unjust burden laid on local movements compared to those over long distances.

For while on intrastate rates much through traffic is moved, the great volume of through and local traffic is interstate, with nearly all long distance traffic passing from one state to another. So that the charge brought by the states is both of (1) discrimination against intrastate, short haul, local traffic, especially from or to non-competitive and non-junction points; and, (2) distance rates unreasonably high in that the growth of business and better methods have shown in this matter no benefit to the domestic shipper.

Reasonableness to Public as Well as Carriers.

In this problem each party is a real plaintiff. Notwithstanding that this court has solemnly declared that it is equally as important that the rate be reasonable to the public as compensatory to the carriers, yet it will be found that in these

cases there has been no proof by the roads, and no consideration by the courts, whether the rates prescribed by the states are not as high as reasonableness to the public will allow.

The only evidence offered in these cases by the roads, and the only matter considered by the trial courts was whether the rates give a fair return to the carriers on the theory that they stand on, not whether the theory they stand on is in accordance with sound public policy. And to this question which the courts did consider—though but half of the problem which should be considered—there is applied a speculative theory, only, supported by opinions, solely, or experiments made in abnormal times measured by unreliable, often impossible, yardsticks.

In the whole course of adjudicated cases nowhere can be found a more farsighted, accurate description of the substantial basic questions which have given cause to these controversies, than that contained in the first but most memorable of them all.

In Attorney General vs. Railroad Companies, 35 Wis., 582, decided as long ago as 1874, Judge Ryan, anticipating the Missouri, Minnesota and Arkansas cases, as well as the others on the way to this court, said:

"It is to be regretted that there is just now more or less excitement against railroad corporations, although we believe

that its extent is greatly exaggerated. But it seems to us quite safe to say that, though this feeling may be unwise, it is not vindictive; and is, rather of the nature of parental anger against those spoiled children of legislation, as our statute books abundantly show them to be, who, after some quarter of a century of legislative favors lavishly showered on them, unwisely mutiny against the first serious legislative restraint they have met. If it is true that the people are too angry, it is very sure that the companies have been too defiant. * * * these corporations and all interested in them may safely rely on the sense of justice of the people and the legislature. The judgment of both may err. It is said that it has erred in the details of this chapter, 273. Of that we are not the judges; but we believe that it is yet to be verified by experiment. It may well be that the high rates charged by the railroads have lessened their own receipts, by crippling the public interests. The affidavits of experts have been read to the contrary; but they are only opinions founded indeed on past statistics. Such opinions, founded on such statistics, would have defeated cheap postage, and are helping today to defeat a moderate tariff. Experience often contradicts such theories. The interests of the public in this regard seems to be identical with the interests of the railroads. We think that there must be a point where the public interest in railroads and the private interest of the corporators meet; where the service of the public at the lowest practicable rate will produce the largest legitimate income to the railroads. It seems to us an utter delusion that the highest tolls will produce the largest income. The companies have hitherto absolutely controlled their own rates. The legislature now limits them. The companies say that the limit is too low. But there is no occasion for heat or passion on either side. The people and the legislature understand well the necessity of the railroads to the state, and the necessity of dealing fairly and justly, and even liberally, with the companies. Time and prudence and wise counsels will set all this right."

We believe that an historical view of the development of

these states, and the experiences of these roads in the last decades, as well as a comparative view of railway rates, both local and long distance, will throw an illuminating light upon these cases.

Competition in the past, and to some slight extent at present, greatly lowered long distance and interstate rates until the last few years. But state rates have never been substantially lowered. What the states need is a readjustment of rate conditions, which at present put a blight upon industrial as well as agricultural development of the valley west of the Mississippi.

Past competition among railways, or potential river trade, and the desire of the roads to earn high compensation by a long through haul—all these have, it is true, developed the desert and peopled waste places, but the future of these very districts, as well as the Union itself, depends upon their progress into self dependent communities, both supplying and demanding all kinds of work. This is impossible without cheap local rates.

(b) Necessity of Reasonable Equality Between Intra and Interstate Rates.

Let us illustrate these matters by reference to the youngest state, the one in which business conditions are the least thor-

oughly formed, but whose future ought to be among the brightest. Because the facts do not appear in the records of these cases, we will suppose the facts to be as we understand them to be.

Oklahoma has shown a wonderful growth in population in the last decade, an increase from 790,205 people for Oklahoma and Indian Territories in 1900 to 1,657,156 in 1910. Railway mileage has grown even more rapidly than population, being 1,967 miles in these territories in 1900, and 6,078 miles in 1910; that is, 401 persons per mile in 1900, and 273 in 1910. The growth in population, together with the growth of railway mileage plainly testify to the growth of business.

Let us suppose that the state is a great producer of petroleum oil, wheat and cotton. Naturally, then, we should expect a flourishing flour mill, cotton seed oil mill, and peroleum oil refinery business. But if Oklahoma wheat cannot proceed to the Oklahoma mill, intrastate, as cheaply as Nebraska and Kansas wheat can proceed, interstate, to the Oklahoma mill, then both the Oklahoma farmer suffers a discriminative loss in the price for his wheat, and the Oklahoma miller suffers from a failure to develop a nearby volume of production. Let us suppose again that while grain rates from Nebraska and Kansas interstate to Oklahoma have descended in recent years, the Oklahoma intrastate grain rates have increased. Such conditions would be against public policy. The earnings of the

roads would be a subsidiary matter—for adjustment. Likewise, the large production of cotton we have supposed, would indicate a development of the cotton seed oil milling industry, but as long as interstate rates from Oklahoma to outside points, as, for instance, St. Louis and Memphis, are relatively much lower than intrastate rates in Oklahoma, this business would continue stunted. Similarly the supposed very large petroleum oil output, would, in its auxiliary industry of refining, be retarded by any great dispairity between interstate and intrastate rates on competitive products. And in the coal mining, which, let us suppose, a few years since, was actually the second largest industry in the state, ranking next in dollars of productive value after agricultural products, a decided decrease in both volume and value would be noted, if intra and interstate rates were unreasonably apart. At least Oklahoma coal mines ought to have rates to Oklahoma points competitive with coal from Colorado and Kansas. And it is not to be supposed that voluntarily the roads on interstate traffic adopt rates confiscatory to themselves. The interest of the railways, however, favor the longest haul from Colorado and Kansas and this industry would show the withering hand of overwhelming discrimination in interstate rates, if the states cannot protect themselves in their interstate trade.

So, through a gamut, including brick, cement, building ma-

terials, down to and including the class rates, the same unjust distinctions might exist.

If so, they would illustrate the necessity of considering public policy as well as railway earnings.

What is supposed above of Oklahoma, we assert is true in a general way of the whole field of this controversy. It will be noticed that excluding Oregon on the northwest and Alabama on the southeast, these cases are the result of business friction in the western portion of the Mississippi Valley; Minnesota, South Dakota, Iowa, Nebraska, Missouri, Kansas, Arkansas, Oklahoma.

Discussing this territory and its carriers, Commissioner Lane recently said (20 I. C. C. p. 327):

"Immediately west of Chicago lies the prairie country where the corn and wheat, the cattle and hogs, which supply in so considerable a part the needs of America, are raised. This was a country already well developed in transportation facilities when the new century dawned, so that there was less room for extension within this territory than there was in the mountain country beyond."

(c) Retarded Growth of Population.

One of the astounding results of the last census is the

slowing up in population increase if not the actual retrogression of the Trans-Mississippi Valley.

Iowa, the great model of an agricultural state:

	Population
1900	2,231,853
1910	2,224,771

A loss.

Nebraska, a great corn state:

1900	1,066,300
1910	1,068,539

A gain of a little more than 2,000 souls.

Kansas, one of the greatest states producing varied grain products:

1900	1,470,475
1910	1,690,949

A gain of less than one-fourth of a million.

Missouri, an empire in itself both industrially, commercially and in agriculture:

1900	3,106,665
1910	3,293,333

Less of a gain than Kansas.

Yet these states have increased enormously in traffic, in commerce, in wealth. But they have no lake traffic, no state-owned canals, no competitive transportation. The railroads have destroyed the trade of the river steamer which formerly plied on every river from New Orleans to St. Paul and St. Louis to Yankton. Something is wrong with the circulation of the political body. The railways are its arteries. Let us analyze the factors.

(d) Enough Railways.

Are there enough railways? Below is a statement of the facts as to this:

Years	State	Population	Mileage	Number of Persons Per Mile
1900	Minnesota	1,757,394	6,560	267
1910		2,075,708	8,766	235
1900	Missouri	3,106,665	8,823	352
1910		3,293,335	8,191	402
1900	Kentucky	2,147,174	3,020	719
1910		2,289,905	3,643	628
1900	Kansas	1,470,475	8,776	167
1910		1,690,949	9,673	175
1900	Oklahoma	790,305	1,967	401
1910		1,657,155	6,078	272
1900	Alabama	1,828,697	4,000	426
1910		2,138,093	5,261	406

1900	Iowa	2,231,853	8,477	263
1910		2,224,771	9,954	220
1900	Oregon	413,536	1,613	257
1910		672,765	2,397	280
1900	South Dakota	401,370	2,818	143
1910		583,888	4,163	140
1900	Nebraska	1,066,300	5,742	187
1910		1,068,539	6,165	173
1900	Arkansas	1,311,564	3,697	423
1910		1,574,449	5,147	305

It appears from this that there has been sufficient increase in track mileage, but that on the whole population per track mile has not entirely kept pace with track increase.

(e) Improvement in Service.

It is notorious that this is the district of non-competitive railway traffic. No other such producing area in this country is by reason of absence of substitutes so dependent on the steam road. No other district produces and exports so much, no other district consumes and imports more. No other district is so entirely at the mercy of the railway.

From this it would naturally be expected that in time of car famine, as in 1906, this district particularly would suffer. It was precisely this territory which the Interstate Commerce

Commission found suffering so greatly that year. See report for 1906, pp. 16, 17 and 18.

Yet up to 1906 there was no great car famine and since 1907 there has been none of note. Car shortage, therefore, alone, cannot be the disease.

Want of competitive conditions will emphasize any other defective service, for instance, the car movement only averaged 23 miles a day in 1906. See Reports Interstate Commerce Commission 1906, p. 16. That cars should average no more than troops may march per day is on its face preposterous if presented as economy of service.

If 23 miles per day was the average for the whole United States, no doubt these long suffering communities of the Mississippi Valley experienced a car movement which equalled a snail's movement.

But these conditions have been much improved. The car famine itself was a very large factor in decreasing average car movement.

While today double tracks extend on the Santa Fe from the east only to Newton, Kansas, on the Chicago and Northwestern only into Nebraska, yet the Union Pacific is double tracking its entire line. The situation while not entirely satisfactory is

vastly improved already, and improving. It can confidently be asserted that it was not want of physical facilities, grade, road bed, rails, engines, cars or side tracks which stunted the growth of the Trans-Missisippi Valley. The roads themselves have had enough to do, or almost too much to do.

An examination of Interstate Commerce Commission groups six, seven and eight, show a greater growth of traffic than mileage. We append it below:

Statement showing comparison of operating revenues of railroads in Interstate Commerce Commission Groups 6, 7 and 8 for the years 1899 and 1909, together with the percentages of the increases in mileage by groups and the various classes of revenue. Interstate Commerce Commission's map attached shows territory comprising each group.

	GROUP NO. 6			GROUP NO. 7.			GROUP NO. 8.		
	1899	1909		1899	1909		1899	1909	
Mileage Operated	42,867	52,209	22.0	10,817	12,994	20.0	23,243	33,951	46.3
Passenger Earnings	52,002,536	99,168,264	90.7	9,151,291	26,394,160	190.0	20,677,284	55,114,083	167.0
Mail	7,415,380	10,247,185	38.3	2,233,519	3,551,046	59.1	3,687,376	5,778,995	56.8
Express	4,431,228	10,283,831	132.0	877,011	2,398,639	173.0	2,650,668	6,565,145	148.0
Other Pass. Revenue	2,061,673	3,717,748	80.4	260,985	729,459	180.0	261,709	1,010,940	287.0
Total	65,910,817	123,417,028	87.2	12,522,806	33,073,304	165.0	27,277,137	68,469,143	151.0
Freight earnings	190,862,453	305,201,264	59.9	38,231,741	83,959,609	120.0	82,278,786	163,825,347	99.5
Other Freight Earnings	447,353	5,152,846	1060.0	10,600	589,726	547.0	75,768	2,786,423	361.0
Other Earnings from Operation	10,119,375	3,458,551	*193.0	1,104,280	200,053	*452.0	3,787,723	503,054	*369.0
Total Freight	201,429,181	313,812,161	55.9	39,346,621	84,749,388	116.0	86,142,277	167,114,824	94.1
Income From Other Sources	19,059,625	3,316,256	*476.0	4,725,048	706,019	*529.0	7,084,443	2,098,001	*71.2
GRAND TOTAL	286,399,623	440,545,445	53.9	56,594,475	118,578,711	109.01	120,503,857	237,682,568	91.6

*These deficits are due to the fact that the new classification of earnings ordered by the Interstate Commerce Commission went into effect in 1908, and many of the items formerly included in "Other earnings from Operation" and "Income from Other Sources," are now embraced in the sub-division "Other Freight Earnings."

The new classification, it is evident, however, did not have any perceptible effect on the net result, when it is desired to show the development in traffic.

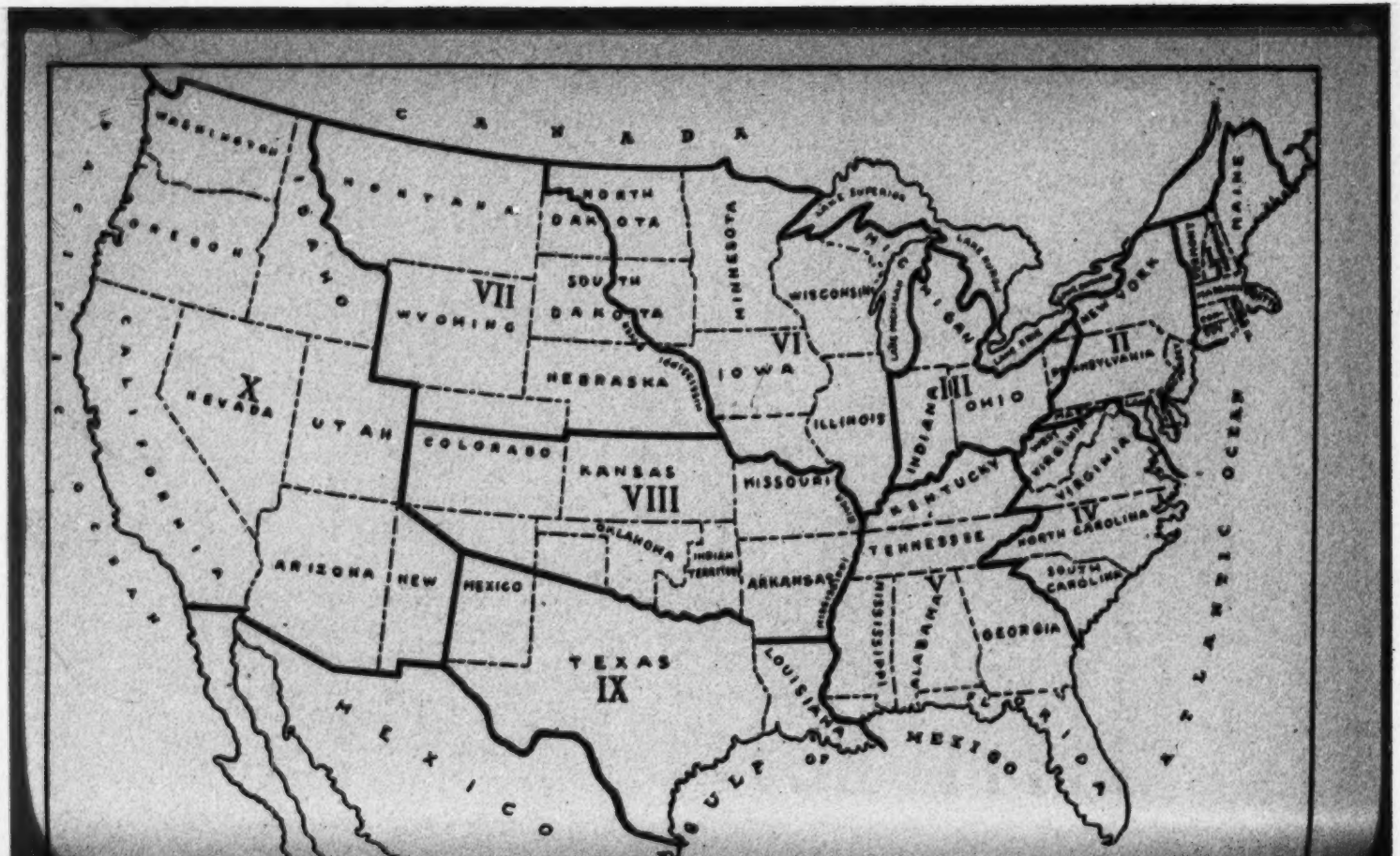
Group VI of course includes Wisconsin and Illinois and a portion of North Dakota, as well as Minnesota, Iowa and a portion of South Dakota and North Missouri.

Group VII includes Montana and Wyoming with portions of North Dakota, South Dakota, Nebraska and the north third of Colorado.

Group VIII, Kansas, Missouri south of the river, Arkansas, Oklahoma, go along with the southern two-thirds of Colorado and a neglible portion of the Texas Panhandle and New Mexico.

First: Mark what territory the commission groups together for similarity.

We append the map:


CANADA
WASHINGTON
OREGON
MONTANA
NORTH DAKOTA
SOUTH DAKOTA
MINNESOTA
WISCONSIN
MICHIGAN
LAKE SUPERIOR
LAKE MICHIGAN
LAKE HURON
LAKE ERIE
LAKE ONTARIO
NEW YORK
MAINE
VII
WYOMING
VI
IOWA
II
PENNSYLVANIA
X
NEVADA
UTAH
NEBRASKA
ILLINOIS
III
INDIANA
OHIO
COLORADO
KANSAS
VIII
MISSOURI
KENTUCKY
VIRGINIA
IV
NORTH CAROLINA
OKLAHOMA
INDIAN TERRITORY
TENNESSEE
ARIZONA
NEW MEXICO
ARKANSAS
SOUTH CAROLINA
V
ALABAMA
MISSISSIPPI
GEORGIA
TEXAS
IX
LOUISIANA
MEXICO
GULF OF MEXICO
ATLANTIC OCEAN

Second: Mark these comparisons:

It is well known that freight rates intrastate are relatively low in Iowa. This fact was referred to by Mr. Justice Brewer in Ames v. Union Pacific, 64 Fed. 165 at page 188. Speaking in 1894 he found that Iowa with 230 persons per railway mile might rightly expect lower freight rates than Nebraska with 190 persons per railway mile.

He distinctly asserted that the roads ought not to be allowed to discriminate against any locality or any state. Yet it is apparent that rates are and for years have been much lower in Iowa, intrastate, than in Missouri, Minnesota, Arkansas and Oklahoma. Yet each of these others in point of population per mile of railway, deserves more than does Iowa. These, then, compare:

	Population	Mileage	Persons Per Railway Mile
Iowa	2,224,771	9,954	223
Minnesota	2,075,708	8,766	225
Missouri	3,293,335	8,191	402
Arkansas	1,574,449	5,147	305
Oklahoma	1,657,155	6,078	273

When the area, as well as population and railway mileage of Nebraska, Kansas and Oklahoma are considered, it is seen that it is the large trans-continental lines crossing Nebraska and Kansas which by raising the mileage of these latter beyond

the needs of the local population have produced a figure of population per mile of road below that indicated by the area and population.

	Area Sq. Mi.	Population	Mileage	Persons Per Mile
Nebraska	77,510	1,068,539	6,165	173
Kansas	52,080	1,690,994	9,073	175
Oklahoma	70,430	1,651,155	6,078	273

It is a matter of judicial knowledge that in the prairie states west of the Missouri, in South Dakota, Nebraska and Kansas, there is practically no water traffic. That in Oklahoma there is not a navigated river. That in Minnesota, Iowa, Missouri and Arkansas river navigation is at a low ebb. But in Wisconsin, Michigan and Illinois, lake traffic is active. Yet the population per mile of road compared to area in Minnesota compares well with Wisconsin and Michigan, though it is conceded that the rates are much higher in the western state.

State	Population	Area	Mileage	Persons Per Mile Road
Minnesota	2,075,708	83,365	8,766	225
Michigan	2,229,905	58,915	9,071	268
Wisconsin	2,333,860	54,450	7,654	347

While the population per mile is greater in Wisconsin the mileage is greatly less. While the area in Michigan is less and the mileage greater, notwithstanding the large lake traffic, the

population per mile is not much greater than that of Minnesota, a prairie state.

Further, see a comparison of the following:

State	Population	Area	Mileage	Persons Per Mile Road
Illinois	5,638,591	56,650	12,086	466
Missouri	3,293,335	69,435	8,191	402
Kentucky	2,229,905	40,400	3,643	628
Indiana	2,700,086	36,350	7,408	364

Illinois and Indiana both have a very large lake traffic and a very low railway rate. Yet Missouri and Kentucky are not out of comparison in point of population per mile of road.

Not only the receipts, tonnage and passenger miles for the entire groups that compose the states in the Trans-Mississippi Valley show the rapidly growing railway buiness, but a comparison of these states with such a state as Wisconsin prove the matter beyond contravention.

A comparison of the growth of the mileage, gross receipts, freight tonnage and passenger traffic cannot be made for the whole of the decade. The results of ten years' operation, however, can be shown for South Dakota, Nebraska, Minnesota and Wisconsin; eight years for Iowa; six years for Kansas and Arkansas; and one year for Oklahoma. The figures are as follows:

TEN YEARS	ONE YEAR	SIX YEARS	TEN YEARS	SIX YEARS	EIGHT YEARS	TEN YEARS
South Dakota	Oklahoma	Arkansas	Nebraska	Kansas	Iowa	Minnesota
1900....2,961.86	1909....5,766.19	1901....3,802.40	1899....5,623.68	1904....8,677.01	1901....9,370.35	1900....6,996.89
1910....4,149.96	1910....6,085.05	1907....4,472.80	1909....5,968.94	1910....8,897.21	1909....9,952.82	1910....8,764.10
Mileage	Mileage	Mileage	Mileage	Mileage	Mileage	Mileage
$1,049,523.08	$36,410,816.91	$2,650,254.64	$22,655,197.00	$56,843,107.40	$44,177,800.24	$44,923,934.76
4,140,088.66	42,015,921.14	7,499,506.02	45,640,013.68	71,471,686.09	63,695,632.63	99,471,992.22
Gross Receipts	Gross Receipts	Gross Receipts	Gross Receipts	Gross Receipts	Gross Receipts	Gross Receipts
674,560.00	3,826,866,874	74,502,116	1,555,404,263	3,627,644,907	2,552,878,895	2,644,634,471
2,113,475.53	7,808,683,998	333,182,313	3,040,084,959	4,877,541,617	4,424,015,052	7,967,824,525
Freight Revenue	Freight Ton Miles	Freight Ton Miles	Freight Ton Miles	Freight Ton Miles	Freight Ton Miles	Freight Ton Miles
9,566,978	1,664,947,172	37,320,154	226,112,149	557,357,899	301,956,580	332,915,891
66,826,113	1,640,943,796	255,409,556	663,788,846	958,645,609	806,058,087	748,723,995
Passengers One Mile	Passengers One Mile	Passengers One Mile	Passengers One Mile	Passengers One Mile	Passengers One Mile	Passengers One Mile

These figures cannot be viewed as accidental, because a comparison of the increase in farming values with values invested, to the product of industry of the states named, compared with Missouri shows a very flattering condition of trade in those states.

We will not at this time consider the agricultural output, because that is largely the result of the questions of climate, and unless a long period of time is covered, a consideration alone of the crop output may be deceptive, but a consideration of the improved acreage and the increase therein, and of the expenditures for farm wages as well as the value of lands and buildings used for farming should give a reasonably accurate notion of the industrial life of the states, and whether the check in population noted above has been caused by any withering of agriculture. In this connection, of course, the fact that a part of Oklahoma is still in the hands of the Indian tribes will be borne in mind as accounting for the small value of improved acreage in that state. The figures are as follows:

South Dakota	Oklahoma	Arkansas	Nebraska	Kansas	Iowa	Minnesota	Missouri	
11,286,000	8,574,000	6,954,000	18,433,000	25,041,000	29,893,000	18,443,000	22,900,000	1900 Improved Acreage
15,802,000	17,496,000	8,062,000	24,356,000	29,858,000	29,467,000	19,009,000	24,528,000	1910 Improved Acreage
40	104	16	32	19	—1-10 Per Cent	6	7	Increase, Per Cent.
220,123,000	$21,407,000	$135,182,000	$577,660,000	$64,365,300	$1,497,555,000	$669,522,060	$543,979,000	Value Land & B'ld'g.s. 1900.
1,003,451,000	$89,295,000	$308,129,000	$1,811,557,000	$1,733,653,000	$3,253,719,000	$1,359,510,000	$1,710,505,000	Value Land & B'ld'g's. 1910.
356	317	128	214	169	117	88	103	Increase, Per Cent.
$5,528,000	$3,676,000	$3,171,600	$7,399,000	$10,793,000	$16,376,000	$16,658,000	$9,804,000	Expenditures for Labor 1900.
$12,821,000	$9,794,000	$7,612,000	$14,942,000	$20,474,000	$24,732,000	$22,186,000	$18,526,000	Expenditures for Labor 1910.
132	166	140	102	90	51	33	89	Increase, Per Cent.

The comparison is for ten years, comparing the year 1900 with the year 1910.

If a similar comparison is made of the industrial life of these states, the result points in the same directon. It is not possible to cite the figures for the ten years, but the figures which will be given are a comparison of the years 1904 with 1909, and thus show the increase for five years.

The retarded condition of a part of Oklahoma will also be borne in mind, but this fact is apparent, that in 1904 the entire industrial output of these states was but $1,352,550,000 in value, whereas five years later the industrial output of these states was $1,811,144,000, or an increase of 33 per cent, and this increase is not to be found in those states showing the greatest increase in population, such as the new state of Oklahoma, but in the states of Iowa, 61 per cent increase; Missouri, 30 per cent increase; Nebraska, 28 per cent increase. The states which we have heretofore shown show a decided check in the growth of their population. It, therefore, appears that this retarded growth of population is not caused by a lack of opportunity for industrial or agricultural development. If the trouble is not to be found in either agriculture or industry, it must be apparent that the cause should next be sought in transportaion. The comparaive figures are as follows:

South Dakota	Oklahoma	Arkansas	Nebraska	Kansas	Iowa	Minnesota	Missouri	
$ 7,585,000	$16,124,000	$ 46,306,000	$ 80,235,000	$ 88,680,000	$111,427,000	$ 184,903,000	$ 379,369,000	Capital Invested Mfg. 1900
12,971,000	38,873,000	70,139,000	84,015,000	154,952,000	171,299,000	275,416,000	442,847,000	Capital Invested Mfg. 1905
71	141	51	5	75	54	49	17	Increase, Per Cent.
$ 1,716,000	$3,513,000	$ 16,854,000	$ 14,097,000	$ 22,576,000	$ 28,945,000	$ 44,876,000	$ 85,646,000	Salaries & Wages Mfg. 1900
2,901,000	9,285,000	22,559,000	19,432,000	32,773,000	43,535,000	62,922,000	109,694,000	Salaries & Wages Mfg. 1905
69	164	34	38	45	50	48	28	Increase, Per Cent.
$ 13,035,000	$24,459,000	$ 53,864,000	$154,918,000	$ 198,245,000	$160,572,000	$ 307,858,000	$439,549,000	Value Product Mfg. 1904.
17,845,000	53,682,000	74,818,000	198,669,000	325,357,000	259,268,000	409,420,000	572,685,000	Value Product Mfg. 1909.
36	119	39	28	64	61	33	30	Increase, Per Cent.
2,492	5,456	33,089	20,260	35,570	49,481	69,636	133,167	No. Wage Employes Mfg 1900
3,585	13,143	44.912	24,323	43,532	61,654	84,768	152,820	No. Wage Employes Mfg. 1905
44	141	36	20	22	25	35	15	Increase, Per Cent.

$1,352,550,000
1,811,144,000 33 Per Cent Increase.

Heretofore we gave a comparison of the operated track mileage and population and number of persons per operated mile of track of the states involved, and pointed out that the low figure for Nebraska and Kansas must be sought in the fact that the trans-continental routes supplied those states with a greater mileage than the local demands necessitated. We also pointed out, while discussing the values, that the large value of Nebraska, Kansas and North Dakota as compared to South Dakota, Iowa, and Missouri, as shown in Census Bulletin No. 21, must be accounted for by the large earnings made in these states because of the transcontinental business, and, therefore, was not an element of value in considering the intrastate business.

We have now called to the court's attention the detailed facts which will prove these assertions. We append a table of the states involved, except that it is impossible to obtain figures showing the earnings for Missouri. Therefore, for our comparison we have taken the figures of earnings for Wisconsin. We make a comparison of the operated track mileage in each of the states, compared to the total gross receipts, compared to the industrial output, and compared to the value of improved farm land and buildings, and showing what for each state is the average earning per mile of track, what the average industrial output per mile, and what the average land value per mile. In this connection, it will, of course, at once appear that such states

as Iowa, Nebraska and South Dakota will head the list of states in farm value per operated mile, those states being essentially agricultural in their output, although there is a very large industrial output in Nebraska and Iowa, and a state like Oklahoma with its new conditions and inalienable Indian lands will, of course, greatly reduce the value of improved farm l·· per mile of track. But when the three points of view of gross receipts, industrial output and land values are considered, in comparison with Missouri, which is paramount both industrially and agriculturally, and with Wisconsin, which is particularly solid in its railway development, it will be seen that the Trans-Missouri Valley as a whole is industrially, agriculturally and in a transportation sense, in a very flattering conditon. The table we append.

	South Dakota	Oklahoma	Arkansas	Nebraska	Kansas	Iowa	Minnesota	Missouri	Wisconsin
Years	1910	1910	1907	1909	1910	1909	1910	1910	1910
Mileage	$ 4,149.06	$ 6,085.05	$ 4,472.80	$ 5,968.94	$ 8,897.21	$ 9,952.82	$ 8,764.10	$ 8,191.	$ 9,922.29
Gross Receipts	4,140,088.66	42,015,921.14	7,499,506.00	45,640,013.68	71,471,686.09	$63,695,632.63	99,471,992.22		43,580,063.61
Average Per Mile	997.83	6,094.78	1,676.69	7,981.30	8,033.04	6,398.34	11,348.79		4,382.04
Industrial Output	17,845,000.00	53,682,000.00	74,818,000.00	135, 699,000.00	325,351,000.00	259,268,000.00	109,420,000.00	572,085,000.00	
Average Per Mile	4,325.00	8,821.00	16,727.00	23,270.00	36,691.00	26,069.00	46,715.00	69,852.00	
Farm Land Value & Building	1,003,451,000.00	89,295,000.00	308,129,000.00	1,811,557,000.00	1,733,658,000.00	3,253,719,000.00	1,259,510,000.00	1,710,505,000.00	
Average Per Mile	242,091.00	14,674.00	68,889.00	303,497.00	194,853.00	326,833.00	143,712.00	2,088.00	

We have now brought before the court all the general facts referred to by Judge Brewer in the case of Ames vs. Union Pacific, 64 Federal, in the section already cited, when on circuit, in discussing a comparison of the freight rates in Iowa and Nebraska. The lamented Justice in that case only had before him the density of population per track mile, whereas, in addition to that fact we have now called to the court's attention the density of traffic, both passenger and freight, per track mile, and the density of improved farm land, which produces tonnage, and the density of industrial life, which is the greatest producer of tonnage. When these various points of view are regarded, it must appear that if in the State of Wisconsin six years ago two and one-half cents was a very sufficient passenger fare, considering both the passenger fare and freight, that in these states which on the average show so much better in railway receipts than does Wisconsin on the basis of freight rates proposed, two cents is an entirely adequate return now. In other words, we think that a consideration of these tables affirmatively shows that the rates prescribed are adequate and compensatory, although the burden of such proof is in no wise upon the states.

If these states be looked upon from the point of view of mileage returns to the roads, it will appear that Minnesota leads with $11,348.79 per operated track mile. This figure is unusually high, and indicates when compared to the State of Wisconsin, $4,382.04, that two cents is certainly more than

adequate in Minnesota. After Minnesota comes Kansas with $8,033.04; Nebraska with $7,981.31; Oklahoma, with $6,904.78, notwithstanding its new and retarded condition, and Iowa, with $6,398.34, although, as was conceded by Judge Brewer all railroad rates in that state are so much lower than in the State of Nebraska. Wisconsin is more than $2,000 a mile lower than Iowa, being $4,382.04. It is true that the state of Arkansas is considerably below the level, being $1,676.69, but in this connection it is pertinent to refer to the words of Judge Ryan, that no doubt the high rates enforced by the roads in that state are the direct cause of the lack of earnings. Upon the whole it appears that though the state of Arkansas is upon the Mississippi River and was settled half a century before Oklahoma, and long before Kansas, Nebraska, and Minnesota, yet something has occurred in that state to retard its development, and from a consideration of its industrial output and improved farm value, it appears that the something cannot have been caused by the inhabitants themselves and must have been caused by the railroads. The state of South Dakota shows only a small earning per mile, $997.83, but it must be remembered that in the state of South Dakota there is not a single road which is a through line—that is, every line is a branch line, every line either ends or starts in the state, and is a distributing and collecting feeder for the main lines operating through Minnesota, and, therefore, very naturally Minne-

sita shows a high average, and South Dakota a low average. But what is said by Professor Meyer in Census Bulletin No. 21 in regard to the effect on and relation of the branch line to the main line applies to this state. If, however, these states are examined from the point of view of farm value, which produces profitable tonnage, it will be seen that the state of South Dakota stands among the first, the first being the state of Iowa with $326,833.00 of improved farm value per mile of track, although its rate of return per mile is low. The state of Nebraska, although its population per operated mile is not as high as that of Iowa, in improved farm value per operated track mile is almost as high, being $303,497.00, and it will hereafter appear that in industrial output it stands ahead of Iowa per operated track mile. After Nebraska, and not a distant third, is South Dakota, with $242,091.00 of average farm value per operated track mile; then follows Kansas, with $194,853.00 per mile; Minnesota, with $143,712.00; Arkansas with $68,889.00; Missouri, with $20,884, and Oklahoma, with $14,674. The reason for the low value of farm land in the latter, due to the fact that much of the land in "Indian Territory" is still unimproved, and that the land in the entire state is but newly upon the market, and, therefore, relatively cheap, we have already noticed. But it will be seen that the State of Missouri is in this particular but very little ahead of the state of Oklahoma, although the state of Missouri is fifth in

populotion in the United States, contains at St. Louis and Kansas City two of the very largest cities in the Union. Yet Missouri is a great farming as well as a great industrial state, and it would therefore appear to be proved that something is wrong in the transportation facilities of this community.

If, now, we look at these states industrially we find that Missouri stands at the very head, with an output per mile of track of $69,843.00; Minnesota next, $46,715.00; Kansas, $36,691.00; Nebraska, $33,270.00; Iowa, $26,069.00; Arkansas $16,727.00; Oklahoma, $8,821.00, and South Dakota with but $4,325.00. It would thus appear upon the whole that the states of Nebraska and Kansas may be taken as averages, and as the earning per mile of track is so large in these states, the conviction cannot be avoided, both that the operation of railways in these states is not only profitable, but has been made so at the expense of the development of the states themseilves, in population, at least.

f. Interstate.

The Stationary Freight Rate and Passenger Fare.

It is thus shown that something is wrong with the commercial circulation, the transportation of the Western Mississippi Valley, and that the vice does not continue in the physical properties, or the management of the movement. There

only remains unexamined the rate. This has been stationary for thirty years. All other commercial and physical conditions have improved, but the freight rate, especially the intrastate freight rate, the life of the community, has remained unappreciative of its duty and the community has a tendency to be stunted thereby.

In answer to the charge that the rates have remained stationary the roads say the cost of operation has grown so that a lowering of the freight tariff has been impossible. If that were true it would be some evidence of bad management. Undoubtedly every natural monopoly should continually decrease charges as it grows. In the case (Willcox vs. Consolidated Gas Co., 212 U. S.) this court recently remarked upon how lower charges on the elevated trains in New York were followed by greater traffic until the lower charge made more money than the former higher charge did.

In that case or before then, the court became informed of the natural and proper development of public service rates on gas, water, electric light to continually grow less under the scientific law of increasing returns (see the previous statements in this brief of Acworth, Ripley, Judge Noyes, etc.). The government both recognized and experienced this in postal rates. During this year the telegraph monopoly has, by devices of "night letters" and "day letters", greatly cheapened intelligence transmission. During this year the sleeping car monopoly has

decreased about 10 per cent the charge for lower berths and the relative charge of "uppers" as compared to "lowers."

In the last sixty days the great express monopoly has anticipated the Interstate Commerce Commission by announcing a cut in rates. If agricultural products are higher, the cause is plain. More mouths but no more land. If cattle are higher, see also the reason, less pasture. If clothes are higher, we have heard of an "indefensible" woolen schedule. If steel is stationary, "time and tide changeth all things" but a trust made article. But why of railroads? More than one-half their operating expense is labor, and labor is higher, they answer. True, but labor as well as other costs are more efficient. Let us see the A. T. & S. F. "Folder," corrected July 20, 1911. It says:

"A twenty years' record. Since twenty years ago, the efficiency for passenger locomotive has been increased 53 per cent; for passenger car, 42 per cent; for freight locomotive, 42 per cent; for freight car, 31 per cent, and per employe, 45 per cent. These results have been achieved in spite of the fact that conditions of employment have become more favorable to the employe so that he works less hours per day for a month's salary, and runs less miles in train and engine service in doing a month's work."

Again, the freight revenue in 1907 as compared to 1888 is as 196.2 to 100, but employees' compensation is 188 as compared to 100. Also that in spite of the 88 per cent increase in employees' compensation, this increased compensation carried

in 1907 in freight ton miles 296.7 as compared to 100 on the basis of what the lower wage carried in 1888.

The Railway Age Gazette of April 3, 1908, contains a summary and comparison of railway results in 1888, 1897, 1907. This is as follows:

	1888	1897	1907	Increase Over 1888 Per Cent	Increase Over 1897 Per Cent
Miles of line	136,883	183,284	227,500	66.1	24.1
Miles all track	168,598	242,013	328,400	94.08	35.7
Net capitalization (thousands)	$7,366,745	$9,168,071	$13,064,279	77.3	42.5
Net capitalization per mile of line	53,819	51,396	57,425	6.7	11.7
Net capitalization per mile of track	43,694	37,882	39,781	*9.0	5.0
Gross earnings (thousands)	910,621	1,122,089	2,585,913	183.9	130.5
Expense of Operation (thousands)	594,994	752,524	1,746,097	193.3	132.0
Ratio, expenses to earnings	65.34	67.06	67.52	3.3	0.7
Passengers carried 1 mile (thousands)	10,100,744	12,256,939	28,405,000	181.2	131.7
Passenger revenue (thousands)	237,266	251,135	568,900	139.8	126.5
Passenger Rev. per Psgr. mile (Cts.)	2,349	2,022	2,010	*14.4	*0.6
Freight tons carried 1 mile (thousands	61,027,464	95,139,022	242,000,000	296.7	154.3
Freight revenue (thousands)	610,884	772,849	1,810,139	196.2	135.4
Revenue per ton per mile (cents)	1,001	0.798	0.748	*25.1	6.3
Locomotives number (1889)	29,036	35,986	54,000	85.9	50.0
Locomotives, weight (tons)	1,161,440	1,836,286	3,672,000	216.4	100.0
Passenger Cars, number (1889)	24,586	33,626	43,400	76.1	29.0
Freight cars, number (1889)	829,885	1,221,730	1,995,000	140.4	63.3
Freight cars capacity (tons)	16,597,700	30,543,000	69,480,000	318.5	127.1
Average tons in train (1889)	179	204	355	98.9	74.0
Employes, number	652,500	823,476	1,675,000	156.7	103.4
Employes, compensation	$373,354,700	$465,601,581	$1,075,000,000	188.0	130.8
Taxes (1890)	31,207,469	43,137,844	81,000,000	159.5	97.7

*Decrease

If the stockholders by increasing their stocks and bonds (77.3) out of proportion to their mileage (66.1) and thereby have increased their fixed charges, is it for them to complain?

Supplies, as we shall show by Commissioner Lane, remain stationary.

It is clear that freight rates ought to have descended in the territory in question unless there is a different condition prevailing there from the average. This the railroads entirely fail to show. But rates in general have descended somewhat. Did so regularly till 1899; then "wobbled" along on an uncertain pathway.

The copy of the Railway Age Gazette of July 31, 1908, contains the following:

Years	Mileage Operated	Tons Hauled	Tons Hauled One Mile	Av. Rate Per Ton Per Mile
1882	104,971	380,490,375	39,302,209,249	1.236 cents
1883	110,414	400,453,439	44,064,923,445	1.236 "
1884	115,704	399,074,749	44,735,207,677	1.124 "
1885	122,320	437,040,099	49,151,894,469	1.057 "
1886	125,185	452,245,254	52,802,070,529	1.042 "
1887	137,028	552,074,752	61,561,069,996	1.034 "
1888	145,387	590,857,253	65,423,005,985	.977 "
1889	157,758	539,639,583	68,727,223,146	.922 "
1890	163,597	636,541,617	76,207,047,298	.941 "
1891	163,402	675,608,333	81,073,784,121	.895 "
1892	171,563	706,555,471	88,241,050,225	.898 "
1893	176,461	745,119,482	93,588,111,833	.878 "
1894	178,708	638,186,553	80,235,104,702	.860 "
1895	180,657	696,761,171	85,227,515,891	.839 "
1896	182,776	765,891,385	95,328,360,278	.806 "
1897	184,428	741,705,946	95,139,022,225	.798 "
1898	186,296	879,006,307	114,077,576,305	.753 "
1899	189,294	959,763,583	123,667,257,153	.724 "
1900	193,343	1,101,680,238	141,599,157,270	.729 "
1901	197,237	1,089,236,440	147,077,136,040	.750 "
1902	202,471	1,300,315,787	157,289,370,053	.757 "
1903	207,977	1,304,394,223	173,221,278993	.763 "
1904	212,677	1,309,899,165	174,522,089,577	.780 "
1905	217,017	1,427,731,905	186,463,109,510	.766 "

The Railway Age Gazette, August 28, 1911, contains an article, *"The Growth of Traffic in the United States,"* which is worth reading. It concludes with the following:

"The traffic of this last year (1910) was equivalent to 346 miles of travel and a ton of freight hauled 2733 miles for every inhabitant of the country, which can be equalled nowhere else in the world."

But in all this there is no relief from the intrastate rates in the Western Mississippi Valley.

(g) Unjust Burdens Rest on Short Haul Traffic.

The real fact of the matter, as to freight rates, is that twenty years ago Iowa and Illinois adopted freight rates lower than the surrounding states, but higher than the then competing interstate rates. The other states are now seeking to obtain what Iowa and Illinois have held for twenty years. Yet Iowa is at such a disadvantage because its intrastate rates are still so much higher than the competitive rates from, say, Illinois points, that manufacturing has not thriven there, but the trade of that district has been monopolized by eastern cities. Of course it is not contended that all railway charges should be in proportion to distance. Terminal costs from one mile up to the end of the freight division are practically the same. Overhead or managerial costs are practically independent of length of haul. But the general rule should be that distance, time, character of service, volume, value and weight ought to determine charges. It is public knowledge that they do not do so.

More than half of all railway expenses are fixed, that is

constant whether a ton of freight or a single wheel moves. All interest charges, rentals and most superintending charges are constant within this definition. (See Noyes, American Railroad Rates, Little, Brown & Co., 1906, p. 17.) The greater portion of the expense, being thus independent of traffic, it follows that any traffic which pays more than the cost of movement adds something to the fund with which to pay the constant charges. For this reason much traffic is voluntarily carried at figures that earn little if anything. Practically all competitive business is subject to this temptation. And as almost all long haul business is open to competition, it follows that a vast volume of this business is carried at rates which are unremunerative. The temptation is too strong, thus to reach out for the long haul competitive business at an expense that can only be met by unreasonably high rates on the non-competitive. The latter located at non-junction points a large volume of it being local in its character, has no opportunity to make a bargain as to who shall transport it. Short haul, local, non-competitive traffic moving between non-junction points has no alternative but to pay whatever amount is charged by the carrier at its doors.

Discussing these matters a recent writer (Rankin, an American Transportation System, Putnam, 1909, p. 406) says:

"Our railways have not always—I might say have not generally—acted on these principles of transportation. Where

they could do so they have sacrificed the short haul to the long haul. They have carried freight long distances at prices perilously near if not below the cost of turning the wheels, and they have compelled the short haul to bear the burden of these losses."

The railways admit this, but they say competition has forced it. Let us examine, then, the course of railway rates in the United States since the beginning.

(b) Competitive Rates Descended Till 1899, Then Ascended.

We desire to emphasize this that from the beginning down to 1899 rates descended generally, but very much less on local, non-competitive business, than on long haul, competitive business. Since 1900 all the physical business reasons which have made for lower rates continued, except that consolidation largely if not entirely had removed competition, yet the rates did not continue to descend. They actually have either ascended or remained stationary.

It appears that where the pressure of competition did not exist the same cheapening of rates did not occur, and that since competition has ceased rate decreases have ceased also.

Clear is it that the only way the public can protect itself is through the action of public functions, and that the only hope or opporunity offered the states to place their business upon a basis where it can reasonably compete with that already established is by the enactment of intrastate rates reasonably

related to the interstate rates in force. It is well known that the low Iowa rates were put upon the basis of the then existing rates in Western Classification territory, but that interstate cuts by commodity rate and otherwise render them ineffective.

*[Note: "One of the earliest duties imposed upon the Commissioners by the law of 1868 was that of making classification and a schedule of maximum rates. They brought to the consideration of the subject mainly the rates that the railway companies themselves had charged in the past, some of them had been special, some had been made under the influence of strong competition, others were made by agreement with all the roads in the State and were supposed to represent all the traffic would bear. The commissioners' rates were, as they thought, a fair and just average from the comparisons instituted, as the law required, between the rates of this and adjoining states, not always the rates in schedules, but those on which the business had been done. The rates made were intended, as far as practicable, to afford relief to the business interests of the State and at the same time give a reasonable compensation for service rendered. After having agreed upon them, they were submitted to the general freight agents and in compliance with their request, the rate at three hundred miles was changed to conform to the Missouri river rates. The Commissioners then changed their rates from one hundred to three hundred miles, at the latter distance reaching the rates fixed by the railway companies themselves." (p. 35, Report of Railroad Commissioners of Iowa, 1888).]

Why should not Des Moines compete to points in Western Iowa? Yet today points across the river in Illinois actually

have a lower rate thither. Similarly Yankton should be in position as to Dell Rapids, South Dakota, to compete with Iola, Kansas. Yet the conditions described for Oklahoma are the conditions also in these other states. Long haul interstate traffic is encouraged from the east to the lasting detriment of a business in the state on short haul local rates.

Interstate Commerce Commission Finds Same Rate Movement.

This statement will find support in the recent investigations of the Interstate Commerce Commission as to rate advances, (20 I. C. C., 243 and Id. 307).

In the second case Mr. Commissioner Lane quotes from the London Statist to show how rates descended to 1899 and since then have ascended as follows:

"Since 1883 comprehensive data covering the whole of the railways of the United States have been published in that excellent work, Poor's Manual, and the information has shown that the traffic of American railways doubles every ten years, but that until 1899 the growth in the earnings was very small in proportion to the growth of traffic in consequence of the constant fall in the average rates and fares. The second cause of increased strength is the maintenance of the average freight rate, which, during the last ten years has enabled the railways to gain all the advantage of the great growth of traffic. From 1889 to 1899 an increase of 85 per cent in the ton mileage was attended by an increase of only 40 per cent in the freight earnings, whereas from 1899 to 1909 an increase of not quite 80 per cent in the ton mileage was attended by an increase of 86.5 per cent in the freight earnings. To show the widely different conditions under which the railways are now operated

from those which prevailed during the greater part of the nineties, when the railways suffered from falling rates, we give, first:

Years.	Ton Mileage	Freight Earnings	Av. Rate Per Ton Per Mile Cent
1899	126,991,703,000	922,436,000	0.726
1889	68,677,277,000	665,962,000	.970
Increase or Decrease....	58,314,426,000	256,474,000	—.244
Per Cent	+84.9	+38.5	—25.1

and second the comparison for the past ten years:

1909	227,198,933,000	1,720,863,000	.757
1899	126,991,703,000	922,436,000	.726
Increase ...	100,207,230,000	798,427,000	.031
Per Cent	78.9	86.5	4.3

"Between 1889 and 1899 the great expansion in traffic brought with it an increase in the train load from 160 tons to 237 tons, but the growth of traffic in the past decade has been accompanied by an improvement in the average trainload from 237 tons to 385 tons. In other words, a growth of 79 per cent in the ton mileage in the past years has been attended by an increase of only 10 per cent in the train mileage."

Nor can this cessation in the fall of railway rates be laid to the door of the "higher cost of living" for net receipts correspond closely with the increase of the traffic.

Growth of Traffic and of Earnings.

Item:	1908-9	1898-99	Increase in Ten Years Miles	Pct.
Miles of Road	236,892	186,224	50,668	27.2
Traffic Units Passenger Miles	29,896,152,000	14,859,542,000	15,036,610,000	101.6
Ton Miles	227,198,933,000	126,991,703,000	100,207,230,000	78.9
Gross Receipts	$2,513,212,000	$1,336,096,000	$1,177,116,000	88.1
Operating Expenses *	$1,751,850,000	$912,154,000	$839,696,000	92.1
Ratio	69.71	68.27	—(1.44)	
Net Receipts	$761,362,000	$423,942,000	337,420,000	79.3

* Includes Taxes.

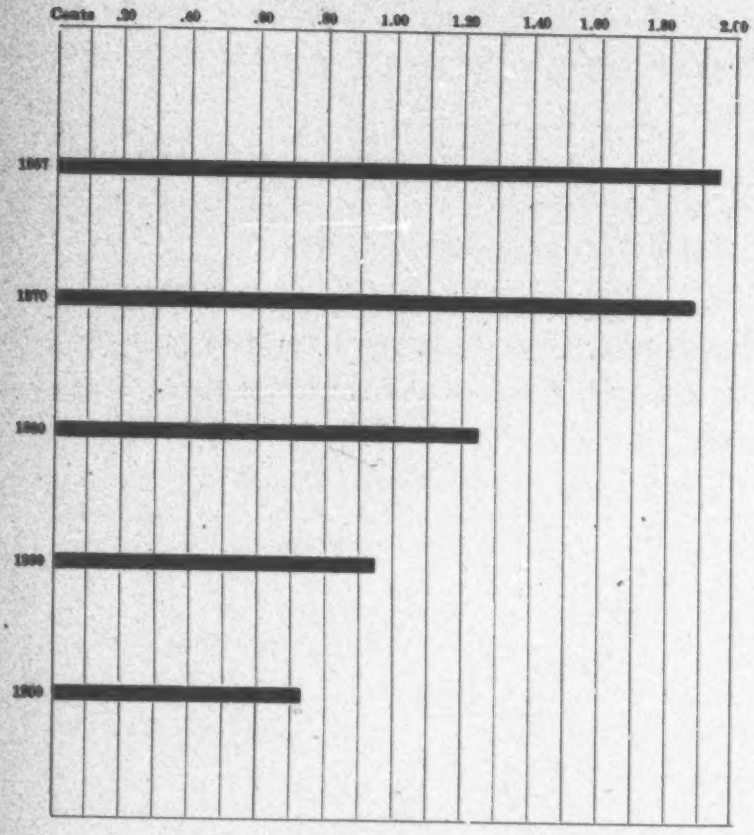
In the first case Mr. Commissioner Prouty, 20 I. C. C. 276, finds that there has been no increase in operating cost per

unit of traffic. Mr. Commissioner Lane in the second case, page 368, says that increases on one matter is offset by decreases in another so that the cost per unit of traffic is the same.

If the statement of the London Statist quoted by Mr. Commissioner Lane above needed corroboration it might be furnished by almost every writer on the subject.

So conservative a writer as Judge Walter C. Noyes in his book on American Railway Rates (pp. 160-180), gives a long discussion of the decrease of rates till 1899 and then the increase since. He uses various tables, this among others, (p. 163):

Average rates per ton mile, 1867-1900.



He concludes (p. 177):

"While rates declined more than half in the thirty years preceding 1899, that year marked the lowest ebb. Rates have not only not declined since that time, but have shown an advancing tendency."

By an analysis it is shown that the reductions have been caused by

(1) Increase in traffic;

(2) Economics in operation, i. e., combining connecting roads; improved facilities, i. e., large cars, etc.

(3) Competition.

It is every-day information that the traffic has continued to increase as to economics in operating: Professor Ewing D. Johnson in his "Elements of Transportation", writing in 1907, at page 88, says:

"The increase in the average passenger train load has been 38 per cent in ten years. During this decade the average load of freight trains had risen from 205 to 357 tons, a gain of 75 per cent."

Every factor that lowered rates previous to 1899 continued after that time except competition. It is plainly evident that on the elimination of competition the rates ascended, so that the public has nothing to hope for from the voluntary act of the carriers. When they must they will, not before.

(i) Much Less Reduction in Local Rates.

Peculiarly important is this as to state rates. In the cited cases before the Interstate Commerce Commission the railways claimed (p. 247):

"That the former relation between such rates (local and long distance) was erroneous and that the shorter distance rates should not be advanced, even though those for the longer distances are."

Because the shorter distance rates were already proportionately too high.

Again at page 305:

"Certain carriers suggest that even though the necessity for additional revenue be not established, the advances proposed in the class rates should be allowed for the reason that * * * and the *long distance rates too low in comparison with the short distance rates.*"

With this Judge Noyes agrees, p. 165:

"Competitive rates * * * have declined much more than local charges."

On page 164 to 168 he gives details in tables which he says (p. 168) indicate "that local rates have declined less rapidly than competitive charges."

These facts have certainly justified investigation by the states.

(j) State Rates Abnormally High.

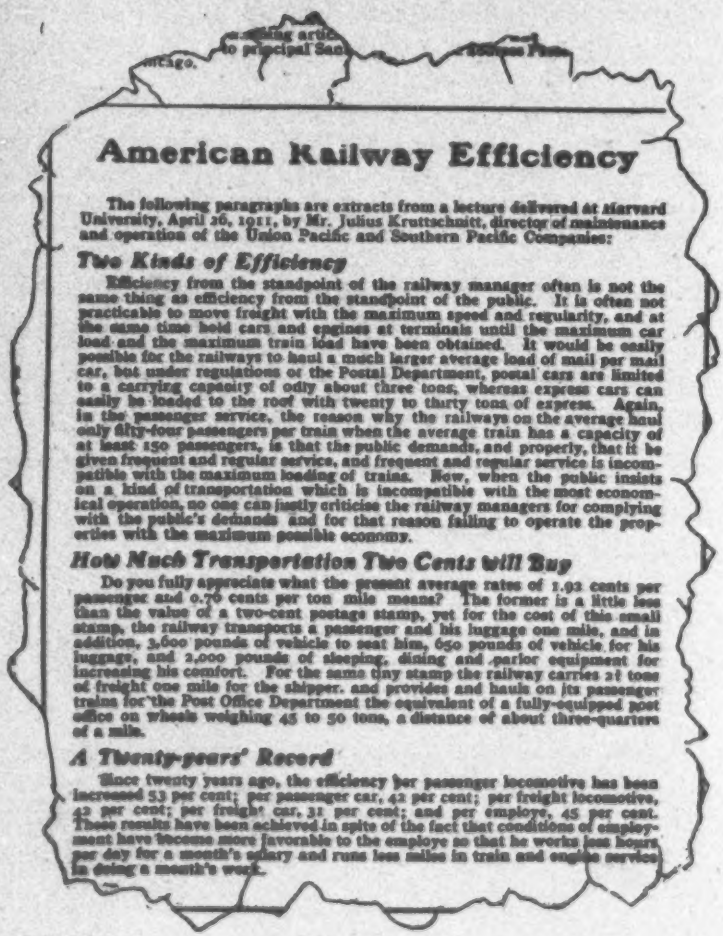
That the state rates are abnormally high is convincing to the public. If fact minimum state rates are much higher than the average of all rates.

For instance, on the back of the A. T. & S. F. folder, corrected to July 20, 1911, is this statement:

"Do you fully appreciate what the present average rates of 1.92 cents per passenger and 0.76 per ton mile means? The former is a little less than the value of a two-cent postage stamp, yet for the cost of this small stamp, the railway transports a passenger and his luggage one mile."

Yet, exactly what these states are doing is to put all passenger rates at two cents, that is, higher than the average rate the roads are now getting and the freight rates are all higher than the .76 cents per ton mile, which is the average they are now receiving. In short, the proposed minimum for passenger and freight traffic by the State is higher than the present average of all rates.

See the folder.



American Railway Efficiency

The following paragraphs are extracts from a lecture delivered at Harvard University, April 26, 1911, by Mr. Julius Kruttschnitt, director of maintenance and operation of the Union Pacific and Southern Pacific Companies:

Two Kinds of Efficiency

Efficiency from the standpoint of the railway manager often is not the same thing as efficiency from the standpoint of the public. It is often not practicable to move freight with the maximum speed and regularity, and at the same time hold cars and engines at terminals until the maximum car load and the maximum train load have been obtained. It would be easily possible for the railways to haul a much larger average load of mail per mail car, but under regulations of the Postal Department, postal cars are limited to a carrying capacity of only about three tons, whereas express cars can easily be loaded to the roof with twenty to thirty tons of express. Again, in the passenger service, the reason why the railways on the average haul only fifty-four passengers per train when the average train has a capacity of at least 150 passengers, is that the public demands, and properly, that it be given frequent and regular service, and frequent and regular service is incompatible with the maximum loading of trains. Now, when the public insists on a kind of transportation which is incompatible with the most economical operation, no one can justly criticise the railway managers for complying with the public's demands and for that reason failing to operate the properties with the maximum possible economy.

How Much Transportation Two Cents will Buy

Do you fully appreciate what the present average rates of 1.92 cents per passenger and 0.76 cents per ton mile means? The former is a little less than the value of a two-cent postage stamp, yet for the cost of this small stamp, the railway transports a passenger and his luggage one mile, and in addition, 3,600 pounds of vehicle to seat him, 650 pounds of vehicle for his luggage, and 2,000 pounds of sleeping, dining and parlor equipment for increasing his comfort. For the same tiny stamp the railway carries 2½ tons of freight one mile for the shipper, and provides and hauls on its passenger trains for the Post Office Department the equivalent of a fully-equipped post office on wheels weighing 45 to 50 tons, a distance of about three-quarters of a mile.

A Twenty-years' Record

Since twenty years ago, the efficiency per passenger locomotive has been increased 53 per cent; per passenger car, 42 per cent; per freight locomotive, 42 per cent; per freight car, 31 per cent; and per employe, 45 per cent. These results have been achieved in spite of the fact that conditions of employment have become more favorable to the employe so that he works less hours per day for a month's salary and runs less miles in train and engine service in doing a month's work.

(k) Condition of Traffic and Carriers Affected.

Mr. Commissioner Lane in his recent investigation as to proposed rate advances (20 I. C. C. 307), considered and

described the identical carriers who will be affected by the actions of these states. At page 327, he says:

"Immediately west of Chicago lies the prairie country where the corn and wheat, the cattle and hogs, which supply in so considerable a part the needs of America are raised. This was a country already well developed in transportation facilities when the new century dawned, so that there was less room for extension within this territory than there was in the mountain country beyond. Nevertheless we find six alone of these roads to have borrowed over $450,000,000—more than the United States Government estimates will be necessary to build the Panama Canal. In ten years these roads have added to their debt on mortgage over 60 per cent of the amount they owed at the beginning of the decade.

"Comparative Statement of Funded Debt.

Roads	1901	1910
Atchison, Topeka & Santa Fe	199,035,710	300,610,983
Chicago & Alton	22,000,000	79,550,500
Chicago & Northwestern	149,329,000	204,959,000
Chicago, Burlington & Quincy	147,204,300	209,856,000
Chicago, Milwaukee & St. Paul	126,941,500	177,534,500
Chicago, Rock Island & Pacific	68,081,000	202,351,000
Total	712,591,510	1,174,861,983

"When we compare the increase in the total capitalization (stocks and bonds) of these same six roads alone, we find that in stock and bond there is an increase of over $759,000,000.

Roads	1901	1910
Atchison, Topeka & Santa Fe.....	422,521,710	580,373,512
Chicago & Alton	61,096,800	122,209,800
Chicago & Northwestern.....	215,556,221	359,313,496
Chicago, Burlington & Quincy.....	257,782,000	330,695,100
Chicago, Milwaukee & St. Paul.....	227,421,700	410,157,600
Chicago, Rock Island & Pacific.....	118,081,000	277,351,000
Total	1,312,449,531	2,071,600,499

"That there has been no fixed or uniform relation between the issuance of stocks and bonds is shown by the following statement:

	Mileage	Capital	Stocks	Bonds
A. T. & S. F.	7,459	580,000,000	280,000,000	280,000,000
C. & A.	998	123,000,000	44,000,000	79,000,000
C. & N. W.	7,629	360,000,000	155,000,000	205,000,000
C. B. & Q.....	8,022	330,000,000	110,000,000	210,000,000
C. M. & St. P.	7,511	410,000,000	232,000,000	178,000,000
C., R. I. & P.	7,400	277,000,000	75,000,000	202,000,000
Total ...	46,000	2,070,000,000	896,000,000	1,254,000,000

"That this capitalization has no relation to income is at once observable from this table, which shows the capitalization per mile when compared with the net revenue per mile:

"Comparison of capitalization per mile of road with operating income per mile on a single track basis (line basis operated) after all expenses have been paid:

Roads	Capital per Mile	Net per Mile
Atchison, Topeka & Santa Fe	84,636	3,697
Chicago, Burlington & Quincy	36,338	2,405
Chicago & Northwestern	47,933	2,488
Chicago, Milwaukee & St. Paul	38,830	2,361
Chicago, Rock Island & Pacific	53,304	1,873
Iowa Central	57,481	1,199
Minneapolis & St. Louis	56,969	1,333
Wabash	106,289	2,969
Chicago & Alton	125,629	4,262

The results of operation, so far as bookkeeping goes appears from the following table:

Page 324:

"Statement showing aggregate figures for Atchison, Topeka and Santa Fe Railway Co., Chicago, Burlington & Quincy Railroad Co., Chicago & Northwestern Railway Co., Chicago, Milwaukee & St. Paul Railway Co., Chicago, Rock Island & Pacific Railway Co., Chicago & Alton Railroad Co.

	Net Profits	Dividends declared	Balance (net Profits less dividends declared)	Maintenance of Ways and structures (1)	Maintenance of equipment
1910	$ 68,883,75	55,504,921	14,379,714	60,573,698	54,388,503
1909	68,612,854	43,620,809	24,992,046	49,409,492	48,343,575
1908	58,433,069	50,161,464	8,270,595	48,311,740	46,442,553
1907	75,934,533	40,633,668	35,290,864	50,963,707	50,125,000
1906	67,938,539	40,162,542	27,775,997	44,120,058	45,361,969
1905	55,622,910	35,820,533	19,802,378	38,390,108	37,583,223
1904	67,006,588	37,075,260	19,931,328	36,640,418	32,314,612
1903	59,361,807	35,674,131	23,687,676	36,615,997	33,106,426
1902	56,041,254	31,668,102	24,373,263	33,567,059	23,786,866
1901	46,949,206	26,196,665	20,752,541	31,488,638	21,861,741
Total for Ten Years	615,693,674	396,538,294	219,155,380	427,979,915	388,661,980

(1) These amounts are included in operating expenses and deducted from revenue before net profits are figured.

"While the balance was but $14,000,000 in 1910, it is worth while passing the eye along the same line, and there it will be seen that maintenance charges in 1910 were nearly

$115,000,000 as against $18,000,000 less the preceding year. If maintenance charges had in the last year been no greater than they were in 1909 the balance would have been nearly $32,000,000. These maintenance totals are interesting as indicating the policy of these roads—to keep equipment, track and structures up to perfect condition out of operating revenues before the net profits are found. The traffic of the year assumes this burden. It is in evidence that the Santa Fe keeps its equipment out of current revenue up to a perfect condition—as good as new. And it was Mr. Ripley's testimony that he improved his road each year out of the operating revenues of the year, one illustration given by himself being the building of a cement tube throughout the longest tunnel on his road at an expense of $700,000 entirely out of maintenance."

Nothing direct is said in that opinion as to the Northern Pacific, but the A. T. & S. F. and C. B. & Q. are chosen as typical roads and discussed as follows:

"Going somewhat into detail as to the two typical roads (see appendix A at the close of this opinion for tabulated statements of the several carriers), we find that the Santa Fe has paid a dividend of five per cent upon its preferred stock for the past ten years, and earned an average of nearly 9 per cent upon its common stock, and this after paying interest upon bonds, which at present aggregate $44,000 a single track mile. Upon a capitalization of $84,000 per mile the Santa Fe earns the following return: Approximately 4 per cent upon $44,000 bonded debt, 5 per cent upon $20,000 preferred stock and 9 per cent on $20,000 common stock. The Santa Fe, however, has reserved a considerable portion of each year's income which might have been applied on common stock. Since the reorganization in 1897 there have been but two years when no dividend was paid on preferred. The total amount paid in dividends since the reorganization of the road in 1897 is

over $102,000,000. In addition to these dividends stockholders have received various 'rights' on new stock."

Page 336:

"From a glance at the income statement of the Burlington it will be seen that its net profits in 1910 after deducting all operating expenses, taxes and fixed charges, amounted to nearly $14,000,000 (which allowed an 8 per cent dividend upon its stock, and a balance or surplus of $5,108,000), or the equivalent of 12 per cent on the common stock. There has not been a year in the past ten when it did not have profits sufficient to pay more than 7 1-2 per cent upon its capital stock of $110,000,000. And since 1903 these have been the percentages earned on capital stock outstanding for the years named: 1903, 13.40 per cent; 1904, 12.32 per cent; 1905, 13.31 per cent; 1906, 12.40 per cent; 1907, 12.49 per cent; 1908. 10.83 per cent; 1909, 11.77 per cent; 1910, 12.61 per cent. The average for the past ten years is 11.68 per cent."

Of course, Mr. Lane's statement has to do with the entire business of the carriers, the great volume of which is interstate, whereas before this Court these cases only concern the intrastate business of these carriers. But it is hard to believe that if the character of the entire business is as described by Mr. Lane that the condition of its various component parts would be different from the general result to which he points.

If, as we have shown, intra, local, short haul and state rates are higher than the average, and that upon the aggregate there is a large profit, it is conceivable that there might be a loss in some state, but inconceivable that the rates of all these states should be confiscatory.

(l) *Different Measures Proposed for State Made Rates and and Railway Made Rates.*

It being demonstrated that western traffic has greatly grown, that competitive traffic grew cheaper as long as there was railway competition, that local traffic has not decreased in rate though greatly increased in volume, that local rates are higher than average rates, that the roads as a whole have prospered, it is only possible to contend that the state rates are confiscatory by instituting for their measurement a different scale or theory of adjustment than that applied to rates in general.

Let us see then what is the basis upon which rates in general are made.

Rates to Move Traffic.

The settled opinion exists both among railroad operatives and state officers that rates are made to move traffic, and, therefore, should be made with reference to the competing rates, and that the question of the cost of the transportation or of the capitalization or valuing of the roads is a very subsidiary consideration, as far as making the rate is concerned.

Yet it will be found in these cases here on appeal that the only consideration had by the court was whether upon the total business done intrastate, the earning was sufficient to make a fair return upon the property used in that service.

We desire to emphasize the fact that rates are not made from this consideration alone, and that this should not have been the only consideration. The following facts support this view:

Historically, Earnings Do Not Control Rates. This is Announced By the Railways Themselves.

A "folder" for the Atchison, Topeka & Santa Fe, corrected to October 20, 1910, contains on its last page:

"Some Facts for the American Citizen to Consider

. . . . . .

III.

Railroad Freight Rates Adjusted to Move Traffic

Nearly all of the freight carried by a railroad company is of commodities for sale. Freight rates have to be adjusted so that the producer can afford to send merchandise to market, and so that the purchaser can afford to buy. Without producer and purchaser there would be no traffic and the railroads could not exist. The railroads are therefore obliged to adjust their rates so that traffic will move. It is this method of rate adjustment that has enabled the industry and commerce of the United States to attain a development which far exceeds that of any other country.

Capitalization Unimportant Factor in Rate-Making

To say that rates are made absolutely regardless of the capitalization of the railroads may sound preposterous, but it is very nearly if not quite true. If a railroad could fix its rates in accordance with its capitalization, would any railroad ever go into bankruptcy? In 1894 a third of the railroad mileage of the United States was in bankruptcy. If it be argued that the capital was so inflated that these railroads could not earn return upon it, the argument admits that rates cannot be forced up because capitalization was forced up.

What President Hadley Said About Freight Rates

Twenty-five years ago Professor Arthur T. Hadley, who is now president of Yale University, wrote:

"It is now pretty well understood that fixed charges do not directly affect rates; nor do dividends affect them, except in so far as a road which is paying very high dividends may

reduce rates lower than it otherwise would, in order not to tempt new capital into the field."

Chairman Knapp's Views on the Rate Question

Honorable Martin A. Knapp, chairman of the Interstate Commerce Commission, testified before the Industrial Commission as follows:

> "I have not seen any instances in which the rates have seemed to much depend upon or be influenced by the capitalisation of a road. * * * The capitalisation of the railroad, I think, cuts no figure in this rate question."

From this we make a deduction that rates are not made with reference to capitalization, or particularly with reference to earnings, but in order that the traffic may move and that the earnings on the capitalization invested is not an important factor.

The Same Rule Announced by Their Statistician.

Mr. James Peabody, Statistician for the Atchison, Topeka & Santa Fe Railway Company, and railway operative and student of over thirty years' experience, was so impressed with the illogical and senseless arrangement of rates, that a few years ago he published a little pamphlet called " A Scientific Basis for Carriers' Rate Schedules." This is the man of whom Mr. Lane, on page 358 in his opinion says:

"The Santa Fe road has had in its employ for many years a man who has a national reputation as a statistician."

Nothing stronger against the present condition of rate making could be said, than is contained in this pamphlet.

On the first page he uses this language:

"If there is any one thing characteristic of the present age, it is that it seeks to ascertain and prescribe correct rules for the government of the various activities of life. In most cases the scientist has kept pace with the progress of the Commercial and industrial arts, so that we have in the science of law, the science of business, of banking, of navigation, of metallurgy, of agriculture, etc., competent rules of action; but the science of railroad transportation—an art so thoroughly interwoven with our social fabric as to be universal in its application—is a minus quantity."

* * * * * * *

"But the quetion of charges remains in the same crude form as when railway transportation was first introduced; and rate schedules which term embraces both the classification and tariff sheets, are little more than a confused mass of arbitrary rulings, modified by comparison, competition and circumstances."

And again on page 9:

"That this hit-or-miss method of rate-making has been allowed to drift along year after year without any serious attempt to institute a radical reform, naturally provokes the inquiry, why, if the matter is of such importance as seems to be universally conceded, it has not already received adequate consideration. The reason is not far to seek. Railroad officials are busy men—more occupied, perhaps, than any other class. The matters crowding for attention upon a traffic manager every day are far beyond his time or strength to properly perform, and the result is that he disposes of that which is the most urgent in what is the quickest and easiest way, and that means that things are kept moving in the same old rut—the rut merely widening as the business grows. The fact is, he has no time to think—he can only do. To institute new methods or radically reform old ones, demands the outlay of thought,

time, labor and often money, and as a rule he has neither at his command. This sketch, which is not overdrawn, may supply the reason why present methods have been so long continued, although it in no sense furnishess an excuse."

Fact Recognized by the Interstate Commerce Commission.

If further proof were needed to corroborate the statement given in the Santa Fe "Folder" and by Mr. Peabody, the statement by Commissioner Prouty may be found on page 248 of the opinion cited:

"The railroad rates of this country have not been constructed, as a rule, upon any scientific basis, and this is especially true of the interstate rates. The traffic officials who have established these rates have generally done so without any special inquiry as to the total amount of revenue which ought to be produced or as to the part of that burden which a particular commodity ought to bear."

This Court has said that one of the elements which should be given consideration in the establishment of a reasonable rate was the cost of the service (Smyth vs. Ames, *supra*), but this is regarded by railroad men as an almost negligible factor.

"'I think,' said Mr. Ripley" (Commissioner Lane's opinion p. 348), "'that the cost of service is only one of the items to be considered in the making of a reasonable rate, and not a very important item at that—either the cost of service or the returns made on capital. I think that while they may be considered under certain conditions they are remote.' And again,

'I think that the cost of the service has very little consideration in the making of rates. Rates are made without a consciousness on the part of the carrier's agent of the return that these rates will bring.

"This is the purport of more of Mr. Ripley's testimony, and it is to be remembered in this connection that Mr. Ripley's experience as a traffic manager has extended from the Atlantic to the Pacific Coast and over several great systems of railroad. 'The maker of the rate,' he says, 'in the first instance, must make the rate such as to permit of the freest intercourse and the freest interchange of commodities in the country regardless of capital, regardless of cost—almost regardless of cost, but entirely regardless of capital.' Then being asked as to whether the Commission should make rates after this railroad fashion, he said, 'I think they (the Commission) should consider the value of the service first and foremost and leave the cost and the value of the properties to altogether secondary consideration.' He was asked if he had said that the making of freight rates, 'has not, never did have, and never will have, never ought to have any relation to the capitalization of the railroads:" To which he replied that this was a correct expression of his views."

What he means, says Commissioner Lane, is (Page 349):

"That an individual rate should not be made with reference to the cost of the service to the railroad, nor should it be made with regard to the return which it would yield to the capital invested in the plant. It should be made so low that as great a body as possible of that character of traffic should move, but all the time there must be borne in mind the fact that out of its aggregate rates the property must be made to pay. This is the American system of railroad rate making."

Now it is apparent in the proof that the considerations

named by Mr. Ripley are not those which were followed by the lower courts.

In all of the cases the lower courts considered, alone, this: whether the unexplained earnings of the roads intrastate amounted to a sufficient return above the unexplained expenses attributed to the state business.

Throughout these cases the critical questions are how shall we divide value, earnings and expenses, as between the states, between passenger and freight, between intra and interstate business.

(m) Statistical Examinations to Be Made.

Mr. Lane also points out the statistical method that should be followed for making comparisons for substantial accuracy whether the rates prescribed are too high or too low. He says, (page 357):

"It has been testified by an official of an important carrier that it was entirely feasible to absolutely segregate about 51 per cent of the cost of operation between passenger and freight traffic; that about 29 per cent was subject to some arbitrary division, but that for all practical purposes it would be accurate; and that only the remainder, or 20 per cent of the whole, had to be determined upon an arbitrary basis. So that it was regarded as practical by statisticians to leave but a very narrow 'twilight zone' between the actual cost of moving a ton of freight and the statistician's estimate; and this estimate it was thought would not vary 5 per cent from the actual cost. This is readily apparent from the fact that of

the total operating expense on most of the roads substantially 50 per cent is chargeable to 'conducting transportation,' 25 per cent to maintenance of ways and structures and 25 per cent to maintenance of equipment. There is no difficulty in segregating the cost of maintenance of equipment as between the passengers and freight. Likewise the 50 per cent under the head of conducting transportation is easily segregated, except as to some station, yard and similar expenses which constitute a small proportion of the total.

"Thus practically 75 per cent of the entire expense is taken care of. The expense of maintenance of ways and structures cannot be allocated, and this has to be divided arbitrarily. Moreover that it is not impractible to estimate the cost of railway service is evidenced by the fact that we have before us the cost figures of both the Santa Fe and the Burlington lines."

Page 358:

"Having in mind, then, these considerations we pass to an examination from railroad figures into the cost to the carrier of carryng a ton of freight a mile as shown by the Santa Fe and Burlington operation sheets. Cost, it will be noted, includes all operating expenses and taxes; not merely the cost of running a train over a track. (The figures herein will be found set forth in the tables forming Appendix "B" attached at the close of this report). The traffic largely in controversy here is that which moves between Chicago and the Missouri River and we will consider first the cost of moving a ton of freight one mile in this terrtory on the Illinois and Missouri divisions of the Santa Fe road."

Page 361:

"The answer to the first question may be that the Santa Fe has practically no branch lines between Chicago and the

Missouri River while the Burlington branch line mileage, compared to its main line mileage, is very great. The report of the Santa Fe would make it appear that the expense of moving freight on branch lines was far greater than on main lines."

Page 362:

"These figures as a whole are among the most suggestive to which the consideration of the Commission has been directed: They appear to make it possible to overcome the one hitherto insuperable objection which has been raised against the primary basing of rates upon cost. This is the effort in all the great business enterprises of our time—to know what a unit costs the plant. In all such cost figures there are arbitraries of many kinds and varying importance. These must be criticised, checked, corrected, and compared through a number of years before they may be said to be in any sense reliable. But there is no scientific achievement without the drudgery of detail, long delay and many tiresome comparisons, tests and analysis. What can a certain transportation plant render a certain service for? What is the lowest figure at which transportation can be sold and some profit made? These are very fundamental questions to which little attention has been paid. We see from the figures at hand, how slight is the actual transportation cost itself compared with the full return which must be made to care for and sustain a great going machine which gives the service. Once we have learned the comparative costs for various services it is not fanciful to say that a schedule of rates may be made which will approach justice as between services. Supplement cost with scientific classification of freight, giving their due to all the various factors such as value, bulk and hazard—especially to value—adding return for use of plant, and we have something certainly more nearly akin to reason than the hazard of a traffic manager no matter how benevolently inclined. Such a theory gives force to every factor which the Supreme Court has said should be considered in the fixing of rates for public utilities. The investor would have his returns.

and the value of the property would be cared for as a part of the rate though this return would, of course, vary with the rates as at present, one service making a larger return to capital than another."

On page 363, quoting from Ackworth, an English authority, Mr. Lane says:

" 'Expenses increase as traffic increases, but by no means in direct proportion. Certain expenses—for instance, maintenance of the works—hardly increase at all; others—for instance, terminal handling of goods at big stations, where the staff can be normally kept fully employed—increased almost as fast as the traffic. The bulk of the expense is intermediate between these two extremes. On the whole a common and probably roughly accurate estimate is to say that half of the total expense is fixed; half varies with the traffic. That is to say, if it costs x to deal with one million units of traffic, five million units will cost not 5 x but ½ x plus (½ x times 5) equals 3 x. Therefore the heavier the traffic the lower (profits remaining equal) need be the rate.' "

Page 367:

"In support of that quoted above from Mr. Acworth is the testimony of Mr. Ripley, in which he said:

" 'A very large proportion of the expenditures of a railroad remain fixed, notwithstanding that there might be a large decrease or a large increase in the earnings. Many of our expenses are not affected by our increase and there is hardly any year that we could not increase our earnings $10,000,000 without increasing our labor more than a small fraction of that. We do not employ, as a rule, when we have a large increase in our earnings, any additional help as to a large portion of our business; it takes more engine men and more train men and more men in

the operating department and some additional help at stations, but not very much, and it is notorious that we can increase our earnings ordinarily enormously without increasing our ratio of expense proportionately. That ought to be the case but in the last two or three years everything has been against us. We can probably increase our earnings $10,000,000 next year, or at least we could without expending more than $2,000,000 additional for labor."

Yet this statistical method and these facts form no part of the lower court's consideration.

Further, Mr. Halford Erickson of the Wisconsin Commission before the National Association of Railway Commissioners at Washington, D. C., November, 1910, in a discussion of freight rates, showed that while it is tedious it is possible to learn the transportation cost of each kind of traffic, with substantial accuracy under average conditions.

The plan is quite similar to that discussed by Commissioner Lane. It is to obtain the costs of units of average transportation, the terminal expenses per cwt. when car is loaded under various weights, the movement expenses per net cwt. per mile when car is loaded under various weights. From these factors a close approximation to knowledge of cost of service can be reached. He proposes a rate schedule planned in this way. We reproduce it to show what can be done, and that practically none of its data is proved in any of these cases:

Rates in Cents Per Cwt., based upon the Adjustment Described in the Text

DISTANCE	CLASSES										Commodities
	1	2	3	4	5	A	B	C	D	E	
Terminal expenses, Cts. per Cwt.	8.40	6.97	5.63	4.20	3.36	3.78	2.94	2.52	2.10	1.68	1.43
Movement expenses, per Cwt., 10 Miles	1.50	1.26	1.01	.75	.60	.68	.53	.45	.375	.30	.26
Total Cost Per Cwt.—											
For 10 Miles	9.90	8.23	6.64	4.95	3.96	4.46	3.47	2.97	2.475	1.98	1.69
For 20 Miles	11.40	9.49	7.65	5.70	4.56	5.14	4.00	3.42	2.85	2.28	1.95
For 30 Miles	12.90	10.75	8.66	6.45	5.16	5.82	4.53	3.87	3.225	2.58	2.21
For 40 Miles	14.40	12.01	9.67	7.20	5.76	6.52	5.06	4.32	3.60	2.88	2.47
For 50 Miles	15.90	13.27	10.68	7.95	6.36	7.18	5.59	4.77	3.975	3.18	2.73
For 60 Miles	17.40	14.53	11.69	8.70	6.96	7.86	6.12	5.22	4.35	3.48	2.99
For 70 Miles	18.90	15.79	12.70	9.45	7.56	8.54	6.65	5.67	4.725	3.78	3.25
For 80 Miles	20.40	17.05	13.71	10.20	8.16	9.22	7.18	6.12	5.10	4.08	3.51
For 90 Miles	21.90	18.31	14.72	10.95	8.76	9.90	7.71	6.57	5.475	4.38	3.77
For 100 Miles	23.40	19.57	15.73	11.70	9.36	10.58	8.24	7.02	5.85	4.68	4.03
For 110 Miles	23.90	19.99	16.07	11.95	9.56	10.81	8.41	7.17	5.97	4.78	4.12
For 120 Miles	24.40	20.41	16.41	12.20	9.76	11.04	8.58	7.32	6.09	4.88	4.21
For 130 Miles	24.90	20.83	16.75	12.45	9.96	11.27	8.75	7.47	6.21	4.98	4.31
For 140 Miles	25.40	21.25	17.09	12.70	10.16	11.50	8.92	7.62	6.33	5.08	4.39
For 150 Miles	25.90	21.67	17.43	12.95	10.36	11.73	9.09	7.77	6.45	5.18	4.48
For 160 Miles	26.40	22.09	17.77	13.20	10.56	11.96	9.26	7.92	6.57	5.28	4.57
For 170 Miles	26.90	22.51	18.11	13.45	10.76	12.19	9.43	8.07	6.69	5.38	4.66
For 180 Miles	27.40	22.93	18.45	13.70	10.96	12.42	9.60	8.22	6.81	5.48	4.75
For 190 Miles	27.90	23.35	18.79	13.95	11.16	12.65	9.77	8.37	6.93	5.58	4.48
For 200 Miles	28.40	23.77	19.13	14.20	11.36	12.88	9.94	8.52	7.05	5.68	4.93
For 220 Miles	30.40	25.45	20.49	15.20	12.16	13.78	10.62	9.12	7.53	6.08	5.27
For 240 Miles	32.40	27.13	21.85	16.20	12.96	14.68	11.30	9.72	9.01	6.48	5.61
For 260 Miles	34.40	28.81	23.21	17.20	13.76	15.58	11.98	10.32	8.49	6.88	5.95
For 280 Miles	36.40	30.49	24.57	18.20	14.56	16.48	12.66	10.92	8.97	7.28	6.29
For 300 Miles	38.40	32.17	25.93	19.20	15.36	17.38	13.34	11.52	9.45	7.68	6.63
For 320 Miles	40.40	33.85	27.29	20.20	16.16	18.28	14.02	12.12	9.93	8.08	6.97
For 340 Miles	42.40	35.53	28.65	21.20	16.96	19.18	14.70	12.72	10.41	8.48	7.31
For 360 Miles	44.40	37.21	30.01	22.20	17.76	20.08	15.38	13.32	10.89	8.88	7.65
For 380 Miles	46.40	38.89	31.37	23.20	18.56	20.98	16.06	13.92	11.37	9.28	7.99
For 400 Miles	48.40	40.57	32.73	24.20	19.36	21.88	16.74	14.52	11.85	9.68	8.33
Movement Expenses 10 Miles; 1st 100 Miles	1.50	1.26	1.01	.75	.60	.68	.53	.45	.375	.30	.26
100 to 200 Miles	.50	.42	.34	.25	.20	.23	.17	.15	.12	.10	.09
Over 200 Miles	1.00	.84	.68	.50	.40	.45	.34	.30	.24	.20	.17

FREIGHT IN EACH CLASS AND THE AVERAGE AND TOTAL REVENUE FROM SAME.

CLASSES	Tons One Mile	Cts. per Ton Mile	Total Revenue
1	43,000,000	3.50	$1,505,000
2	43,000,000	2.90	1,247,000
3	43,000,000	2.32	998,000
4	43,000,000	1.75	744,000
5	105,500,000	1.40	1,497,000
A.	90,000,000	1.60	1,444,000
B.	150,000,000	1.22	1,830,000
C.	226,500,000	1.06	2,419,000
D.	310,000,000	.87	4,439,000
E.	550,000,000	.71	3,930,000
Com.	627,800,000	.61	3,850,000
	2,431,800,000	0.98	$23,885,000

(n) Immoderate Expenses.

We will not delay to add much to what is so excellently said in the various briefs by the states under this head, except to notice that the "concealment of earnings" in maintenance is so notorious as to be assumed by writers on American railways.

As illustrations of immoderate charges for maintenance, the following is cited from the work of Carl Snyder, American Railways as Investments, 1907. As to the Atchison, Topeka & Santa Fe Railway, at page 75, he says:

"From the following table it will be seen that the total appropriations per mile for maintenance have increased in six years 70 per cent, while the traffic density in the same period has increased only about 40 per cent.

MAINTENANCE PER MILE.

Year	Traffic Density	Way	Equipment	Total
1900-1	496,579	$ 824	$ 801	$1,625
1901-2	538,733	781	1,001	1,782
1902-3	570,777	1,168	1,068	2,236
1903-4	573,404	1,121	1,223	2,344
1904-5	569,668	1,370	1,314	2,684
1905-6	693,873	1,479	1,271	2,750
Average	577,005	$1,123	$1,113	$2,236

Extra Main Track, 309 Miles.

MAINTENANCE PER MILE.

	Traffic Density	Way	Equipment	Total
Noorthern Pacific	729,102	$1,300	$ 791	$2,091
Southern Pacific	594,898	1,446	1,246	2,692
Union Pacific	739,206	1,173	1,049	2,222
Rock Island	462,106	1,022	759	1,781
Burlington	580,024	1,104	1,032	2,136

"It will be seen from the above comparisons that the amounts expended by the Atchison per year compare very favorably with the Southern Pacific and the Union Pacific the former of which especially has been heavily charged for improvements in its operating expenses.

"That the Atchison's charges are high is evidenced in the items for maintenance of equipment. These amounted in 1906 to $3,101 per locomotive, $888 per passenger car, and $103 per freight car. These are very high figures, and can only mean that large additions were made to the rolling stock of the company under the guise of maintenance.

"From 1903 to 1905 Atchison suffered very severely from floods, and the increased maintenance charges through these and subsequent years represent, in part, an endeavor to repair the damage that has been done, out of earnings. But over and above these operating expenses of the Atchison undoubtedly show considerable concealed earnings, which probably would be conservatively estimated at $500 per mile. Even if the 1906 average were reduced by this sum, it would still compare favorably, for example, with the St. Paul or the North Western. This on 8,400 miles of road, would mean concealed earnings to the amount of over $4,000,000. That an item of something like these proportions was there speaks admirably for the management of the road."

As to the Burlington, at page 194, he says:

"*Maintenance.*—Maintenance charges of the Burlington have habitually been very heavy, and have to a considerable extent exceeded those of the North Western or the St. Paul. The items, through a series of years, stand as follows:

Year	Traffic Density	Maintenance per mile Way	Equipment	Total
1900-1	499,329	$1,119	$ 874	$1,993
1901-2	493,503	960	916	1,876
1902-3	592,641	1,084	907	1,991
1903-4	591,827	1,107	952	2,119
1904-5	590,819	1,025	1,103	2,128
1905-6	713,563	1,271	1,533	2,804
Average	580,024	1,094	1,032	2,126
North Western	640,983	$ 991	$ 858	$1,849
St. Paul	601,003	929	632	1,561
Rock Island	462,106	1,022	759	1,781
Mo. Pac. (3 yrs.)	623,807	819	821	1,640

Miles extra track, 525.

"It will be seen that the average traffic density for these six years was slightly below the North Western or the St. Paul while the average expenditures for the Burlington have been about $300 per mile more than the North Western and nearly $600 over the St. Paul.

"It will be noted, too, that there was an exceptionally heavy increase in the maintenance charges for 1906, the average expenditure of $2,804 per mile for that year for the Burlington comparing with $2,139 for the North Western and $1,661 for the St. Paul.

"The maintenance charges are not separately itemized so as to permit of analysis, but it is safe to say that normal maintenance is very much more represented by the figures for 1904-5 than in those of 1906. This difference amounted to between six and seven hundred dollars per mile at least. Taken at the lower figure, this on the 8,900 miles of road operated, would have meant a difference of more than $5,000,000 in the

net earnings and income of the road, and would increase the surplus by that amount.

"It is to be noted, however, that the Burlington does not set aside a special improvement fund, as do most other roads, its improvements being charged directly to operating expenses. Thus, for example, in the seven years to 1906 the total appropriation for improvements on the North Western amounted to over $33,000,000, an average of $4,500,000 per year. Here as elsewhere, it will be seen that surplus and earnings are a good deal a matter of bookkeeping and the nominal difference between different roads has often little basis in reality."

(o) Railways Exercise Discretion in Charging to Maintenance.

When these abnormal charges are shown the railways defend by stating that they have kept their accounts as directed by the Commission. The point is the Commission does not direct in this matter. Commissioner Lane in the cited cases says: (Page 331.)

"It is to be borne in mind that it has been American railroad policy to maintain the property fully, in a constantly improved condition, both as to roadbed and equipment out of current revenue. *The carriers even under the rules of the Commission* obtainng only during the last two or three years, are given the widest latitude as to charges that shall be made against the mantenance accounts. Notwithstanding the unquesioned liberality of the policy of the railroads towards themselves in charging maintenance expenditures to operating expenses. * * * "

Page 332:

"In the last analysis a surplus is a matter of bookkeeping.

'Surplus', as used in railway accounting, means simply the bookkeeping balance of the 'profit and loss' account, which, presuming all other values carried on the books to be true, indicates the excess of assets over liabilities. It is whatever the railroad management chooses to make it and depends upon the nature of a railroad's capitalization, the policy of the road with respect to charges for maintenance, the volume of the dividend, and other factors entirely within the directors' control. Rates *might be doubled in this territory and leave the surpluses of the carriers where they are today.* The amount of operating revenue is not determinative of the amount which the carrier will set aside as a reserve for depreciation of the plant, for a sinking fund to meet coming obligations, or upon which to draw for improvements."

But in these cases there is no proof justifying the heavy maintenance expenses. The proof without it is worthless.

Chicago v. Wellman, 143 U. S. 339.

FINALE.

Practice.

There remains the question of practice, whether carriers who have not chosen to make a good faith actual test of the rates proposed and then in case such test indicated confiscation, made a good faithful presentation of all facts to the function of government, especially established for the purpose of making and modifying rates, should be allowed to resort to a court of equity to enjoin rates, whose correction they have taken no step towards.

It would appear both that an adequate remedy has not

been resorted to and also that by failure to test and submit the full facts of the test the carriers are wanting in equity.

Peculiarly is this true when it is considered how competitive rates and business change, how a rate, void yesterday, may be valid tomorrow, (Smyth v. Ames, 171 U. S. 361), because of new facts wrought by time and change.

And especially because the rates are generally made separately, a joint attack upon them should not be allowed until an application to modify them be denied.

In M. K. & T. vs. I. C. C., 164 Fed. 645; the Circuit Court of Appeals for the Eighth Circuit considered this question and said, *per curiam*:

"Whether it should appear that in the proceedings before the Commission a carrier declined or neglected to avail itself court in the exercise of a sound discretion, ought to refuse to of the opportunity to be heard in opposition to the order the grant equitable relief to the carrier upon a showing which could have been but was not made before the Commission, and ought to require that the same be first presented to the Commission for its consideration, is a question which does not arise in this case, and it is mentioned now only to indicate that it is not decided by anything said herein."

But evidently it was of sufficient importance to be mentioned by the whole court.

In Home T. & T. Co. vs. Los Angeles, 211 U. S. 281, this court considered the fact that the company declined to furnish

facts within their knowledge which would enable the board to exercise its powers intelligently and justly as worthy of remark bearing upon all phases of the case and justifying the action of the municipal board.

In Knoxville vs. Knoxville Water Co., 212 U. S. 1, at 19, this court most emphatically declared the duty of public service corporations *"to freely furnish the information upon which a just regulation can be based."*

To sit tight until a legislative order becomes effective for want of evidence, accessible to the carriers, then rush to a court of equity to nullify it upon evidence never furnished the board that made the order, is certainly making a farce of the duty to furnish information. The information to be furnished is that proper regulation be had, not solely that improper regulation be nullified.

This court in a series of cases, Texas & Pacific Railway Co. vs. Abilene Cotton Oil Co., 204 U. S. 426; Southern Ry. Co. vs. Tift, 206 U. S. 428, has held that the federal courts will not examine into the reasonableness of an interstate rate in advance of an inquiry by the Interstate Commerce Commission.

Equal and cogent reasons would suggest that neither should the courts examine the reasonableness of intrastate rates

until an inquiry be had by the state commissions, based on a test of them.

Further, in Prentis vs. Atlantic Coast Line, 211 U. S. 210, on the ground of comity alone, not of lack of jurisdiction, this court held that when the state law provided for an appeal to the Supreme Court of the State from the rate-making office, that such appeal must be taken before the federal court would hear an application to enjoin the rate. Likewise, if the state law vests a state board, as in the Arkansas case, the railroad commission, with power to modify rates, should the power to modify not be invoked before the application for injunction be heard?

Further, this court in Boise Artesian Water Co. vs. Boise City, 213 U. S. 276, has clearly warned the lower federal courts against interfering with the fiscal affairs of the states where resort might be had as well to the state courts as to them.

And in Welch vs. Swasey, 214 U. S. 91, it appears that a state court is presumed to possess a more intimate acquaintance by judicial cognizance with local conditions than a federal court can have.

Particularly in rate controversies the seasons, the crops, local enterprises, prospects, business conditions, flood, famine, drought, and those psychological conditions of public confidence that make or unmake the profit of ventures, and

thus the reasonableness or unreasonableness of rates and agreements must rest more nearly in the knowledge of local judges. Not a rate maker or railway operative but qualifies his every answer by an appeal to the peculiar local conditions of his problem.

The Circuit Court of the United States cannot make rates, nor substitute proper orders for those it enjoins. This power the state boards have, this power should therefore be appealed to upon a full showing of the facts before an injunction be heard in the federal courts.

Like other legislation of the day, these questions are largely economic and novel. The courts are without precedent to guide them. Resort must be to the judge's grasp of political economy.

In a recent case Mr. Justice Holmes said:

"This case is decided upon an economic theory which a large part of the country does not entertain. * * * The Fourteenth Amendment does not enact Mr. Herbert Spencer's 'Social Statics.'"

So eminent an authority as the professor of administrative law in Columbia University, Dr. F. J. Goodnow, has said recently that the ordinary legal literature is obsolete in its attitude toward economic history and conditions, and then there is perhaps "no subject whose distinctive literature has been less

influenced by the evolutionary idea than the law." This is particularly unfortunate, in Dr. Goodnow's opinion, in the United States, where the limitations of written constitutions make it imperative that the judiciary should be progressive in its interpretation of statutes.

The progress of enjoining the states in what they think is the proper exercise of police power should never be encouraged except where absolutely necessary. The continual application for and granting of such injunctions must stifle the power of the state to govern itself. In a democracy the control to be successful, must be self control. Every opportunity should be offered the states to correct or amend their own acts Previous resort to every remedy of which the state functions are capable should be the *sine qua non* of resort to these courts. Otherwise, an overturning of the balance established by the constitution between the states and the United States, each supreme in its own sphere, will follow. These gentlemen who seek that destruction in this case offer nothing better in lieu of what they end. The Congress cannot regulate intrastate commerce. (Howard vs. Illinois Central, 207 U. S. 141).

If a better were suggested, it at least would not be the government provided by the Constitution, which is the only one this court is authorized to apply at this time. The American experiment of a dual system, each its own master, in its own

house, has not been tried sufficiently long to be abandoned now.

Respectfully submitted,

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S. M. BREWSTER,
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R. C. BRICKELL,
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HARRY C. SELHEIMER,
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For Alabama.
FREDERICK N. JUDSON,
Of Counsel, and
CHAS. WEST,
Attorney General,
For Oklahoma.

In the Supreme Court of the United States.

OCTOBER TERM, 1912.

STATE RAILROAD RATE CASES.

JOHN A. KNOTT ET AL., Railroad and Warehouse Commissioners et al., appellants.
v.
CHICAGO, BURLINGTON & QUINCY R. R. Co.
} No. 9 (Missouri).

GEORGE T. SIMPSON ET AL.,
v.
JOSEPH C. SHEPARD.
} No. 291 (Minnesota).

And also the other State Railroad Rate cases, being numbered as follows: 12, 339 to 372, 111, 159, 219, 291, 292, 293, 428, 440 and 441.

MOTION OF THE UNITED STATES TO FILE A BRIEF AS AMICUS CURIÆ.

Comes now the United States and moves the court for leave to file herein, as *amicus curiæ*, the brief which it has filed before the United States Commerce Court in *Houston, East & West Texas Ry. Co. et al* v. *United States* and *Texas & Pacific Railway Co.* v.

United States, Nos. 67 and 68 of the October term, 1911, of that court.

As cause for this motion it is shown that the above-mentioned cases in the Commerce Court involve some of the fundamental points at issue in the State Railroad Rate cases. The questions have been argued before the Commerce Court, but have not been decided by that court, and it is hardly expected that they will be decided until this court has passed upon the matter.

The parties and counsel in the State Rate cases are so multitudinous that it has been impracticable to notify them of this motion.

WINFRED T. DENISON,
Assistant Attorney General.

APRIL 21, 1913.

○

In the Supreme Court of the United States.

OCTOBER TERM, 1912.

STATE RAILROAD RATE CASES.

JOHN A. KNOTT ET AL., RAILROAD & Warehouse Commissioners et al., appellants,
v.
CHICAGO, BURLINGTON & QUINCY R. R. Co.
} No. 9 (Missouri).

GEORGE T. SIMPSON ET AL.,
v.
DAVID C. SHEPARD.
} No. 291 (Minnesota).

And also the other State Railroad Rate cases, being numbered as follows: 12, 339 to 372, 111, 159, 219, 291, 292, 293, 428, 440, and 441.

BRIEF FILED BY THE UNITED STATES AS AMICUS CURIÆ, PURSUANT TO LEAVE OF THE COURT.

The appended brief was filed in the Commerce Court in the cases in which it is entitled, and these cases are now under advisement by that court.

The facts are probably sufficiently stated in the brief itself, but we have appended the report and

order of the commission which were attacked by the petitioners in the Commerce Court, and which give them in greater detail.

WINFRED T. DENISON,
Assistant Attorney General.

THURLOW M. GORDON,
Special Assistant to the Attorney General.

APRIL 21, 1913.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 130.

JOHN A. KNOTT, H. R. OGLESBY, FRANK A. WIGHTMAN, RAILROAD AND WAREHOUSE COMMISSIONERS, AND ELLIOTT W. MAJOR, ATTORNEY-GENERAL OF THE STATE OF MISSOURI, APPELLANTS,

vs.

CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY.

No. 134.

CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY, APPELLANT,

vs.

JOHN A. KNOTT, H. R. OGLESBY, FRANK A. WIGHTMAN, RAILROAD AND WAREHOUSE COMMISSIONERS, AND ELLIOTT W. MAJOR, ATTORNEY-GENERAL OF THE STATE OF MISSOURI.

MOTION TO ADVANCE APPEAL AND CROSS-APPEAL.

Come now John A. Knott, H. R. Oglesby, and Frank A. Wightman, Railroad and Warehouse Commissioners, and Elliott W. Major, Attorney-

General, of the State of Missouri, appellants in case No. 130 and appellees in case No. 134, by Elliott W. Major, Attorney-General of the State of Missouri, and Frederick W. Lehmann and Sanford B. Ladd, counsellors for said appellants in said case No. 130 and counsellors for appellees in said case No. 134, and move this honorable court to advance said appeal and cross-appeal upon the docket of this court and make an order setting same for argument and submission on Tuesday, October 10, 1911, or as near that date as is consistent with the business and convenience of this honorable court, and offer the following reasons and suggestions in support of this motion:

I.

That said appeal and cross-appeal were, upon motion to advance filed February 10, 1910, ordered advanced and set for argument and submission upon the first day of the October Term, 1910, of this court. That both said appeal and cross-appeal were argued and submitted to the court on October 13, 1910, and that the court, after having same under submission for several months, did on its own motion in April, 1911, order said cases restored to the docket for reargument. The court not having set a day certain for the reargument and resubmission, this motion is filed to the end that the same may be advanced and set down for reargument on October 10, 1911, or as soon there-

after as the business and convenience of this honorable court will permit.

II.

That by final decree and amended final decree in the Circuit Court of the United States for the Western District of Missouri, the appellants in said case No. 130, to wit, Elliott W. Major, Attorney-General of the State of Missouri; John A. Knott, H. R. Oglesby, and Frank A. Wightman, Railroad and Warehouse Commissioners of the State of Missouri, and each of them, their agents, employees and successors are enjoined from enforcing or attempting directly or indirectly by suit or in any other manner whatsover to enforce against complainant and seventeen other railroad companies doing a general railroad business in the State of Missouri and their officers, agents, employees or servants any of the provisions of or penalties provided for in five acts passed by the Legislature of the State of Missouri, which said acts are as follows:

First, an act approved April 14, 1905, entitled:

> "An act to amend article IV, chapter 12 of the Revised Statutes of Missouri of 1899, entitled, 'Railroad classification, charges, commissioners,' by adding a new section thereto, to be known as section 1195*a*."

which said act regulates and fixes the rates to be charged by railroad companies for hauling and carrying undressed stone, crushed rock, sand or building or paving bricks in the State of Missouri.

(Laws, 1905, page 104.)

Second, an act approved April 15, 1905, entitled:

> "An act entitled, 'An act to amend chapter 12 of the Revised Statutes of Missouri, revision of 1899, entitled "Corporations, private," by repealing section 1194 of said Revised Statutes, being part of article IV of said chapter concerning railroad classification, charges, commissioners, and to enact in lieu thereof the following new sections providing for the regulation of freight charges by railroads and the recovery of penalties for the violation thereof.' "
>
> (Laws, 1905, page 102.)

Third, an act approved February 27, 1907, entitled:

> "An act to repeal sections 1191 and 1192 of chapter 12, article 4, Revised Statutes of Missouri, 1899, entitled 'Railroad classification, charges, commissioners,' by striking out sections 1191 and 1192 and enacting the following new sections in lieu thereof to be known as sections 1191 and 1192 and 1192*a*."

which said act regulates and fixes the rates to be charged by railroad companies for carrying and transporting passengers in the State of Missouri

and is commonly known and spoken of as the "two-cent passenger fare law."

(Laws, 1907, page 170.)

Fourth, an act approved March 19, 1907, entitled:

> "An act to repeal an act of the 43rd general assembly, approved April 15, 1905, entitled 'An act to amend chapter 12 of the Revised Statutes of Missouri, revision of 1899, entitled "Corporations, private," by repealing section 1194 of said Revised Statutes, being part of article IV of said chapter, concerning railroad classification, charges, commissioners, and to enact in lieu thereof the following new sections providing for the regulation of freight charges by railroads and the recovery of penalties for the violation thereof; and to repeal an act of the 43d General Assembly, approved April 14, 1905, entitled, 'An act to amend article IV, chapter 12, of the Revised Statutes of Missouri, 1899, entitled "Railroad classification, charges, commissioners," by adding a new section thereto, to be known as section 1195*a*, fixing the charges for carrying undressed stone, crushed rock, and building or paving brick,' and to enact in lieu thereof certain new sections, to be known as sections 1194, 1194*a*-1, 1194*b*-1, and 1194*c*-1, providing for the regulation of freight charges by railroads and prescribing the punishment for a violation thereof, which new section shall read as follows:"

which said act classifies freight and regulates and fixes the rate to be charged for carrying and hauling same in the State of Missouri by the railroad companies and is commonly known and spoken of as the "Maximum freight rate law."

(Laws, 1907, page 171.)

Fifth, an act approved March 19, 1907, entitled:

> "An act to amend article 4, chapter 12, Revised Statutes of Missouri of 1899 by adding a new section thereto, to be known as section 1195*a*, and relating to freight charges and classifications."

which said act regulates and fixes the rates to be charged in the State of Missouri by the railroad companies for carrying and hauling apples and pears, strawberries, peaches, grapes and other berries and fixing the minimum pound weight for cars of such fruits.

(Laws, 1907, page 187.)

That by reason of being so enjoined and by reason of said court holding all of said laws inoperative and unconstitutional, and by reason of the fact that this appeal does not supersede the injunction portions of the decree and does not, therefore, act as a supersedeas, none of said laws of said State can be or are enforceable.

III.

That the early submission of this case on appeal and cross-appeal is a matter of vital interest and importance to the State of Missouri, its officers and citizens. That it has now been more than two years since the record and appeal have been filed in this court.

There is but one record in said case No. 130 and case No. 134, same being the appeal and cross-appeal; both the appeal and cross-appeal must be advanced under the same order if this motion is granted and for that reason this motion is to advance both the appeal and the cross-appeal.

Respectfully submitted,

ELLIOTT W. MAJOR,
Attorney-General of Missouri;
JOHN M. ATKINSON,
Assistant Attorney-General;
Counsellors for Appellants in Case No. 130 *and Counsellors for Appellees in Case No.* 134.

FREDERICK W. LEHMANN,
SANFORD B. LADD,
Of Counsel.

ARGUMENT.

Appellants in case No. 130 were permanently enjoined on April 17, 1909, in the Circuit Court of the United States for the Western District of Missouri by the Chicago, Burlington & Quincy Railroad Company from enforcing the provisions of five separate acts passed by the Legislature of the State of Missouri, which said acts are as follows:

1st. An act approved April 14, 1905, regulating and fixing the rates to be charged by railroad companies for hauling and carrying in Missouri undressed stone, crushed rock, sand, and building or paving bricks (Laws, 1905, page 104).

2d. An act approved April 15, 1905, classifying and regulating charges for the transportation of freight by railroad companies in the State of Missouri and providing penalties for violation of the act (Laws, 1905, page 102).

3d. An act approved February 27, 1907, regulating and fixing the rates to be charged by railroad companies for hauling and transporting passengers in the State of Missouri and fixing the maximum rate at two cents per mile (Laws, 1907, page 170).

4th. An act approved March 19, 1907, classifying freight and fixing and regulating the rates to be charged for carrying and hauling same in the

State of Missouri by the railroad companies (Laws, 1907, page 171).

5th. An act approved March 19, 1907, and being an act regulating and fixing the rates to be charged by the railroads for carrying and hauling apples, pears, strawberries, peaches, grapes, and other berries and fixing the minimum pound weight for cars of such fruit (Laws, 1907, page 187).

The transcript of the record in case No. 130 was filed with the clerk of the Supreme Court of the United States Sept. 13, 1909, and a transcript of the record in the cross-appeal, case No. 134, was filed with the clerk of the Supreme Court of the United States Sept. 22, 1909, and a full and complete copy of the transcript of the record in the appeal and cross-appeal was printed in one record under the rules of this court and copies thereof delivered to the appellants in case No. 130 and to the Chicago, Burlington & Quincy Railroad Company in December, 1909.

The cross-appeal was taken by the Chicago, Burlington & Quincy Railroad Company from the action of the court in refusing to modify the final decree and opinion in case No. 130.

The appeal and cross-appeal were advanced upon order of this honorable court made at the October Term, 1909, and the same was set down for argument and submission upon the first day of the October Term, 1910, and the same was argued and submitted to the court on October 13,

1910. The court after considering the case until the latter part of April, 1911, did at the same time, and upon its own motion, order said appeal and cross-appeal restored to the docket for reargument. The court did not set a special day for argument and submission. This motion is to advance in order that the court may set an early day for the reargument and resubmission of said appeal and cross-appeal.

None of the said legislative enactments of the State of Missouri can be or have been in the meantime enforced against the Chicago, Burlington & Quincy Railroad Company by reason of the fact the final decree in said case No. 130 provides that an appeal shall not supersede the injunctive portions of the decree (Printed Record, vol. V, 5248) and the appeal in this case does not operate as a supersedeas. The early hearing and determination of this case on appeal and cross-appeal by this honorable court is therefore a matter of vital interest and great importance to the State of Missouri, its officers and its citizens.

ELLIOTT W. MAJOR,
Attorney-General of Missouri;
JOHN M. ATKINSON,
Assistant Attorney-General;
Counsellors for Appellants in Case No. 130 *and Counsellors for Appellees in Case No.* 132.

FREDERICK W. LEHMANN,
SANFORD B. LADD,
Of Counsel.

[Endorsed:] File Nos. 21,821 and 21,837. Supreme Court U. S. October Term, 1911. Term Nos. 130 and 134. John A. Knott *et al.*, appellants, *vs.* Chicago, Burlington & Quincy Railroad. Co. Chicago, Burlington & Quincy Railroad Co., appellant, *vs.* John A. Knott *et al.* Motion to advance. Filed August 16th, 1911.

[12881]

Supreme Court, U. S.
FILED.
OCT 9 1911
JAMES H. McKENNEY,
Clerk.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1911.

JOHN A. KNOTT *et al.*,
Appellants,
v.
CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY,
Appellee.
No. 9

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY,
Appellant,
v.
JOHN A. KNOTT *et al.*,
Appellees.
No. 12

Appeal (No. 180) and Cross Appeal (No. 184) from the Circuit Court of the United States for the Western Division of the Western District of Missouri.

Suggestions in Opposition to Motion to Advance.

O. M. SPENCER,
FRANK HAGERMAN,
Solicitors for C. B. & Q. R. R. Co.

John B. Sherrill, Printer, 325 Dearborn Ave., Kansas City, Mo.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1911.

JOHN A. KNOTT *et al.*, *Appellants*,
v.
CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, *Appellee*. } No. 130

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, *Appellant*,
v.
JOHN A. KNOTT *et al.*, *Appellees*. } No. 134

Appeal (No. 130) and Cross Appeal (No. 134) from the Circuit Court of the United States for the Western Division of the Western District of Missouri.

Suggestions in Opposition to Motion to Advance.

The Chicago, Burlington & Quincy Railroad Company objects to any advancement of these cases unless there be advanced with them and heard at the same time the other seventeen cases heard below at the same time upon the same evidence, all de-

termined by one finding of facts and the appeals in which are here pending, being numbered 672 to 705 inclusive, a motion to advance having therein been filed which is to be submitted herewith.

(a) *Appeal in case No.* 130.

Case No. 130 is an appeal by the Railroad Commissioners and Attorney General of Missouri, seeking to reverse a decree of the Circuit Court of the Western Division of the Western District of that state in favor of the Chicago, Burlington & Quincy Railroad Company, enjoining the enforcement of the two-cent passenger and the freight carload maximum state statutory rates because as a matter of fact they were confiscatory.

(b) *Cross Appeal in case No.* 134.

Case No. 134 is a cross appeal in the same case, seeking, as a matter of precaution and to have certain other questions decided, to review the action below refusing to hold that the rates were invalid regardless of their confiscatory nature, so that the result below would, if necessary, be maintained on grounds other than those there adopted.

(c) *Submission heretofore made.*

Upon the application of the state these cases were advanced, argued and submitted upon October 18, 1910.

(d) *Eighteen separate cases were together instituted and determined below and one only at first appealed, argued and submitted. A hearing of one only might give an unfair advantage to the state.*

In the original brief herein counsel made this protest against the advantage of singling out one case out of eighteen:

"In the court below each of the eighteen railroad companies having more than 45 miles of road in Missouri, obtained, after final hearing, a decree permanently enjoining the enforcement against it of certain state freight and passenger rate statutes found from 5027 printed pages of evidence (Rec., 213-5240) to be confiscatory. (Opinion, Rec., 5285, findings of fact, Rec., 5305; *St. L. & S. F. R. Co.* v. *Hadley*, 168 Fed. Rep., 419; Rec., 5368, 5370, 5275; 155 Fed. Rep., 220; Rec., 5279.) Case No. 326 is an appeal by defendants from the decree in favor of the Chicago, Burlington & Quincy Railroad Company *only*, while case No. 334 is a cross appeal in the same case. No appeal was taken in the other seventeen cases. A motion to advance was here filed and sustained. The record consists of five large volumes comprising 5339 printed pages, of which 133 pages represent all the pleadings, order and decrees (Rec., 1-54, 61-94, 95-106, 114-116, 5240-5268) separately made in the cases appealed; the remaining 5206 printed pages (Rec., 54-58, 60-61, 94-95, 106-114, 116-213, 5268-5330) represent the portions of the record in the parts of the proceedings common to the entire eighteen cases, and *all* the evidence taken in *all* the cases (Rec. 213), 3651 pages of which were taken in other cases (Missouri Pacific, Rec., 1464-2582; Wabash, Rec., 2583-3685; St. Louis & San Francisco and eight other companies, Rec., 3687-3731, 3767-3742, 4782-5096, 5106-5190, 5226-5239). There would, therefore, have been little expense, comparatively to have taken appeals in the other seventeen cases or to have separately printed only that portion of the evidence applicable to this case. The whole railroad situation in the state would have been presented by appealing all the cases. As it is, the court and counsel must grope through a record applicable to many roads in order to single out and apply such facts only as relate to one. The value of each railway property (Finding Rec., 5315) and the earnings therefrom and expenses thereof (Findings, Rec. 5315-5326) and actual losses (id.) are entirely different, so that the facts might show that a rate law was confiscatory as to one company and not as to any other, though here confiscation existed as to all. Therefore, the appeal in the Chicago, Burlington & Quincy case *alone* is necessarily prosecuted upon the theory that it is for some reason the *best* road for the appellants' side of the contro-

versy, its earning being larger (Finding, Rec., 5315-5326), and its interstate business proportionately greater than that of any other company, while its stock and bond issue (Rec. 1383) per mile and much lower. It is also the only road the passenger mileage of which is greater than the revenue, a feature, which in the argument, will cut some figure. The short line necessarily fixes the rate across Missouri (Exhibit 4, Rec., 4806; Finding 8, Rec., 5306.) This is the C. B. & Q. with a distance of 200 miles; other roads must carry across the state 280 miles. The mileage rate gives returns only upon 200 miles; the long road to obtain this return must go to the expense of carrying 80 miles farther. A fair test would have been one case, one agreed to as such, or one actually representative of average condition. Fairer still would be a presentation of all the cases. *An agreement for a test case was not even requested.* This one case is certainly not any fair test of the state rate legislation applicable to all roads. No favor was extended in not appealing the other cases. While the cases involve interests somewhat public in their nature, there is actually involved in the decree from which the appeal is prosecuted only the validity of the state rates as to *one* railroad. As the cases were tried below together and upon the same evidence singling out of the case of one company tends to confusion."

(e) *Numbers and names of the prevailing complainants below in the eighteen cases, with abbreviations commonly used in the record.*

These are:

No. 2988, St. Louis and San Francisco Railroad Company (St. L. & S. F. R. Co.)

No. 2989, The Atchison, Topeka and Santa Fe Railway Company (A. T. & S. F. R. Co.)

No. 2990, The St. Louis Southwestern Railway Company (St. L. S. W. R. Co.)

No. 2991, The Chicago, Rock Island and Pacific Railway Company (C. R. I. & P. R. Co.)

No. 2992, The St. Louis, Kansas City and Colorado Railway Company (St. L., K. C. & C. R. Co.)

No. 2993, The Kansas City Southern Railway Company (K. C. S. R. Co.)

No. 2994, The St. Louis & Hannibal Railway Company (St. L. & H. R. Co.)

No. 2995, The Missouri Pacific Railway Company (Mo. Pac. R. Co.)

No. 2996, St. Louis, Iron Mountain & Southern Railway Company (St. L. I. M. & S. R. Co.)

No. 2997, Missouri, Kansas & Texas Railway Company (M. K. & T. R. Co.)

No. 2998, Chicago, Burlington & Quincy Railroad Company (C. B. & Q. R. Co.)

No. 2999, Quincy, Omaha and Kansas City Railroad Company (Q. O. & K. C. R. Co.)

No. 3000, The Wabash Railroad Company (Wab. R. Co.)

No. 3001, The St. Joseph & Grand Island Railway Company (St. J. G. I. R. Co.)

No. 3002, Kansas City, Clinton & Springfield Railway Company (K. C. C. & S. R. Co.)

No. 3003, Chicago Great Western Railway Company (C. G. W. R. Co.)

No. 3004, Chicago, Milwaukee & St. Paul Railway Company (C. M. & St. P. R. Co.)

No. 3006, The Chicago & Alton Railroad Company (C. & A. R. Co.)

(f) *Findings of facts and decrees.*

The court below made one finding of fact (Rec., 5305-5327, 168 Fed. Rep., 317, 319-337) and filed opinions (Rec., 5286-5304, 168 Fed. Rep., 317, 3566; Rec., 5327-5330) covering all the cases

though a separate decree (Rec., 5241-5243) was entered as to each complainant which, upon motion (Rec., 5244-5245) at the same term, was modified (Rec., 5245-5246) in some minor respects.

(g) *State's appeal of the C. B. & Q. case.*

The original decree (Rec., 5241-5243) of March 8, 1909, was upon April 17, 1909, and at the same term amended (Rec., 5246-5249) and an appeal (Rec., 5265-5268) taken therefrom upon July 28, 1909.

(h) *Subsequent appeals of the other cases.*

The decrees in the other seventeen cases were entered at the same time as that in the C. B. & Q. case. Immediately prior to the expiration of the two years in which to appeal, the state in March, 1911, applied for and was granted appeals in each of the other cases. These applications were granted and cross appeals taken. All are here docketed, the appeals and cross appeals making thirty-four cases numbered 672 to 705 inclusive. A motion has been filed to advance all of them for hearing with this case, which motion is to be submitted with that of the state to advance this the C. B. & Q. case.

(i) *Prompt action here by the railroads.*

Immediately upon the taking of the appeals in these other cases, the C. B. & Q. R. Co. upon March 20, 1911, filed here a motion setting forth the foregoing facts and asking the court to set aside the submission of its case and restore it for argument with the other seventeen cases so that the entire rate situation in

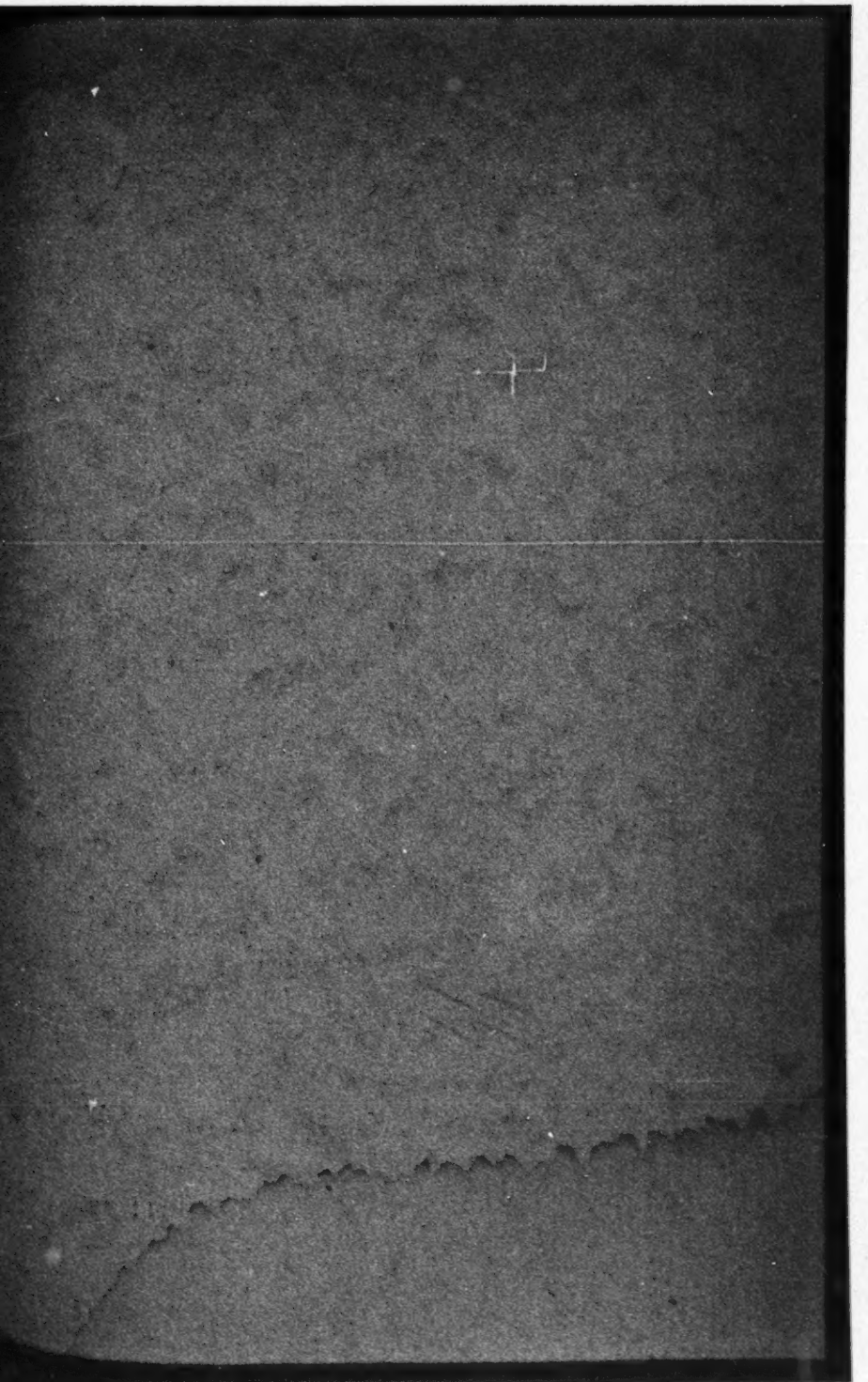
Missouri would be before the court at the same time. While this motion, as made, was, upon April 3, 1911, denied, yet upon the following Monday, March 10, 1911, the court, of its own motion, set aside the submission and restored these cases for oral argument. No order was made for advancement and no mention was made of the other appeals for the manifest reason that they had not then been docketed. Now that they are here it seems to be only fair to have them all heard at the same time.

(j) *Reasons for these suggestions.*

The case then is this: In the court below each of the eighteen railroads in the state obtained, after one final hearing upon the same evidence, a decree permanently enjoining the enforcement of certain state freight and passenger rates because confiscatory, a single finding of fact being made as to all the roads. The cases by consent were tried together and determined in March, 1909, upon the same evidence. Upon July 28, 1909, the state appealed one case, that of the C. B. & Q. R. Co., and obtained its advancement. It was here argued and submitted October 13, 1910, but not decided. In March, 1911, the state appealed the other seventeen cases, and the railway companies took cross appeals therein. The C. B. & Q. then asked the court to reinstate the case for argument so that all the cases could be heard at the same time. The court, without giving any reasons for its action, set aside the submission and restored the case for argument. The remaining seventeen cases are now here. All the evidence is contained in the record in the C. B. & Q. case for use in all the cases, the record in the other cases by stipulation containing only the pleadings and decrees in each. Each company makes a different showing as to the value of property and the earnings and income thereof. The roads traverse different parts of the state. The entire rate situation in the state will appear and can be better tested by determin-

ing all the cases at one and the same time, whereas the C. B. & Q. case alone determines only that case and leaves the rest undetermined. One should not therefore be heard without the others.

O. M. SPENCER,
FRANK HAGERMAN,
Solicitors for C. B. & Q. R. R. Co.



IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1909.

No. [redacted]

JOHN A. KNOTT, H. R. OGLESBY, FRANK A. WIGHTMAN, RAILROAD AND WAREHOUSE COMMISSIONERS, AND ELLIOTT W. MAJOR, ATTORNEY-GENERAL OF THE STATE OF MISSOURI, APPELLANTS,

vs.

CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY.

No. [redacted]

CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY, APPELLANT,

vs.

JOHN A. KNOTT, H. R. OGLESBY, FRANK A. WIGHTMAN, RAILROAD AND WAREHOUSE COMMISSIONERS, AND ELLIOTT W. MAJOR, ATTORNEY-GENERAL OF THE STATE OF MISSOURI.

MOTION TO ADVANCE APPEAL AND CROSS-APPEAL.

ELLIOTT W. MAJOR,
Attorney-General of Missouri,
JOHN M. ATKINSON,
Assistant Attorney-General,
Counsellors for Appellants in Case No. 595 and Counsellors for Appellees in Case No. 611.

FREDERICK W. LEHMANN,
SANFORD B. LADD,
Of Counsel.

(21,821 and 21,837)

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 595.

JOHN A. KNOTT, H. R. OGLESBY, FRANK A. WIGHTMAN, RAILROAD AND WAREHOUSE COMMISSIONERS, AND ELLIOTT W. MAJOR, ATTORNEY-GENERAL OF THE STATE OF MISSOURI, APPELLANTS,

vs.

CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY.

No. 611.

CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY, APPELLANT,

vs.

JOHN A. KNOTT, H. R. OGLESBY, FRANK A. WIGHTMAN, RAILROAD AND WAREHOUSE COMMISSIONERS, AND ELLIOTT W. MAJOR, ATTORNEY-GENERAL OF THE STATE OF MISSOURI.

MOTION TO ADVANCE APPEAL AND CROSS-APPEAL.

Come now John A. Knott, H. R. Oglesby, and Frank A. Wightman, Railroad and Warehouse Commissioners, and Elliott W. Major, Attorney-General of the State of Mis-

souri, appellants in case No. 595 and appellees in case No. 611, by Elliott W. Major, Attorney-General of the State of Missouri, and Frederick W. Lehmann and Sandford B. Ladd, counsellors for said appellants in said case No. 595 and counsellors for appellees in said case No. 611, and move this honorable Court to advance these cases both on appeal and cross-appeal (No. 595 and No. 611) upon the docket of this Court and make an order setting said cases down for argument and hearing on April 4th, 1910, or as near that date as is consistent with the convenience of this honorable Court and offer the following reasons and suggestions in support of this motion:

I.

That by final decree and amended final decree in the Circuit Court of the United States for the Western District of Missouri, the appellants in said case No. 595, to wit, Elliott W. Major, Attorney-General of the State of Missouri; John A. Knott, H. R. Oglesby, and Frank A. Wightman, Railroad and Warehouse Commissioners of the State of Missouri, and each of them, their agents, employees and successors are enjoined from enforcing or attempting directly or indirectly by suit or in any other manner whatsoever to enforce against complainant and seventeen other railroad companies doing a general railroad business in the State of Missouri and their officers, agents, employees or servants any of the provisions of or penalties provided for in five acts passed by the Legislature of the State of Missouri, which said acts are as follows:

First, an act approved April 14, 1905, entitled:

> "An act to amend article IV, chapter 12 of the Revised Statutes of Missouri of 1899, entitled, 'Railroad classification, charges, commissioners,' by adding a new section thereto, to be known as section 1195*a*."

which said act regulates and fixes the rates to be charged by railroad companies for hauling and carrying undressed

stone, crushed rock, sand or building or paving bricks in the State of Missouri.

(Laws, 1905, page 104.)

Second, an act approved April 15, 1905, entitled:

> "An act entitled, 'An act to amend chapter 12 of the Revised Statutes of Missouri, revision of 1899, entitled "Corporations, private," by repealing section 1194 of said Revised Statutes, being part of article IV of said chapter concerning railroad classification, charges, commissioners, and to enact in lieu thereof the following new sections providing for the regulation of freight charges by railroads and the recovery of penalties for the violation thereof.' "
>
> (Laws, 1905, page 102.)

Third, an act approved February 27, 1907, entitled:

> "An act to repeal sections 1191 and 1192 of chapter 12, article 4, Revised Statutes of Missouri, 1899, entitled 'Railroad classification, charges, commissioners,' by striking out sections 1191 and 1192 and enacting the following new sections in lieu thereof to be known as sections 1191 and 1192 and 1192*a*."

which said act regulates and fixes the rates to be charged by railroad companies for carrying and transporting passengers in the State of Missouri and is commonly known and spoken of as the "two-cent passenger fare law."

(Laws, 1907, page 170.)

Fourth, an act approved March 19, 1907, entitled:

> "An act to repeal an act of the 43rd general assembly, approved April 15, 1905, entitled 'An act to amend chapter 12 of the Revised Statutes of Missouri, revision of 1899, entitled "Corporations, private," by repealing section 1194 of said Revised Statutes, being part of article IV of said chapter, concerning railroad classification, charges, commissioners, and to enact in lieu thereof the following new sections providing for the regulation of freight charges by railroads and

> the recovery of penalties for the violation thereof; and to repeal an act of the 43rd general assembly, approved April 14, 1905, entitled, 'An act to amend article IV, chapter 12, of the Revised Statutes of Missouri, 1899, entitled "Railroad classification, charges, commissioners," by adding a new section thereto, to be known as section 1195*a*, fixing the charges for carrying undressed stone, crushed rock, and building or paving brick,' and to enact in lieu thereof certain new sections, to be known as sections 1194, 1194*a*–1, 1194*b*–1, and 1194*c*–1, providing for the regulation of freight charges by railroads and prescribing the punishment for a violation thereof, which new section shall read as follows:"

which said act classifies freight and regulates and fixes the rates to be charged for carrying and hauling same in the State of Missouri by the railroad companies and is commonly known and spoken of as the "Maximum freight rate law."

(Laws, 1907, page 171.)

Fifth, an act approved March 19, 1907, entitled:

> "An act to amend article 4, chapter 12, Revised Statutes of Missouri of 1899 by adding a new section thereto, to be known as section 1195*a*, and relating to freight charges and classifications."

which said act regulates and fixes the rates to be charged in the State of Missouri by the railroad companies for carrying and hauling apples and pears, strawberries, peaches, grapes and other berries and fixing the minimum pound weight for cars of such fruits.

(Laws, 1907, page 187.)

That by reason of being so enjoined and by reason of said Court holding all of said laws inoperative and unconstitutional, and by reason of the fact that this appeal does not supersede the injunctive portions of this decree and does not, therefore, act as a supersedeas, none of said laws of said State can or are enforceable.

II.

That the amended final decree in said case No. 595 was rendered and entered of record on April 17th, 1909, and as the complainants in the original and supplemental bill comprised eighteen of the railroads doing business in the State of Missouri, there are now seventeen other cases pending in the said Circuit Court of the United States for the Western District of Missouri against these appellants with the final amended decrees in each of said seventeen cases exactly similar to the decree in this case (No. 595) and as the appellants' time in which to take and perfect an appeal in each of said seventeen other cases is limited to two years, it is, therefore, important and necessary that both the appeal and cross-appeal be disposed of before the expiration of that time.

III.

That, as there is but one record in said case No. 595 and No. 611, same being the appeal and cross-appeal, both cases, both appeals must be advanced under the same order if this motion is granted and for that reason this motion is to advance both the appeal case No. 595 and the cross-appeal case No. 611.

Respectfully submitted,

ELLIOTT W. MAJOR,
Attorney-General of the State of Missouri,
JOHN M. ATKINSON,
Assistant Attorney-General,
Counsellors for Appellants in Case No. 595 and
Counsellors for Appellees in Case No. 611.

FREDERICK W. LEHMANN,
SANDFORD B. LADD,
Of Counsel.

STATEMENT.

Appellants in case No. 595 were permanently enjoined on April 17th, 1909, in the Circuit Court of the United States for the Western District of Missouri by the Chicago, Burlington & Quincy Railroad Company from enforcing the provisions of five separate acts passed by the Legislature of the State of Missouri, which said acts are as follows:

1*st*. An act approved April 14th, 1905, regulating and fixing the rates to be charged by railroad companies for hauling and carrying in Missouri undressed stone, crushed rock, sand and building or paving bricks (Laws, 1905, page 104).

2*nd*. An act approved April 15th, 1905, classifying and regulating charges for the transportation of freight by railroad companies in the State of Missouri and providing penalties for violation of the act (Laws, 1905, page 102).

3*rd*. An act approved February 27th, 1907, regulating and fixing the rates to be charged by railroad companies for hauling and transporting passengers in the State of Missouri and fixing the maximum rate at two cents per mile (Laws, 1907, page 170.

4*th*. An act approved March 19th, 1907, classifying freight and fixing and regulating the rates to be charged for carrying and hauling same in the State of Missouri by the railroad companies (Laws, 1907, page 171).

5*th*. An act approved March 19th, 1907, and being an act regulating and fixing the rates to be charged by the railroads for carrying and hauling apples, pears, strawberries, peaches, grapes and other berries and fixing the minimum pound weight for cars of such fruit (Laws, 1907, page 187).

Appellants were also permanently enjoined from enforcing each and every one of the above-named acts against each of seventeen other railroads in seventeen other separate cases, which said cases are now pending in said Circuit Court of the United States awaiting the final determination of this case in the Supreme Court of the United States. The Court

found, adjudged and decreed that the maximum rates, both freight and passenger, in each of said five enactments of the Legislature of Missouri were unreasonable and confiscatory and that a compliance with same would take the property of the complainant in each of the eighteen cases without due process of law. The decree in each of the other seventeen cases is identical with the decree in case No. 595 aforesaid on the docket of this honorable Court save and except as to the name of the complainant.

In order to avoid a multiplicity of appeals and unnecessarily burdening the labors of this honorable Court and in order to avoid unnecessary and heavy expenses, the appellants have prosecuted but the one appeal, as they may, if the necessity arises, prosecute appeals in the other cases at any time within two years from the date of the amended final decree.

The transcript of the record in case No. 595 was filed with the clerk of the Supreme Court of the United States Sept. 13th, 1909, and a transcript of the record in the cross-appeal, case No. 611, was filed with the clerk of the Supreme Court of the United States Sept. 22nd, 1909, and a full and complete copy of the transcript of the record in the appeal and cross-appeal was printed in one record under the rules of this Court and copies thereof delivered to the appellants in case No. 595 and to the Chicago, Burlington & Quincy Railroad Company in December, 1909.

The cross-appeal was taken by the Chicago, Burlington & Quincy Railroad Company, appellant, from the action of the Court in refusing to modify the final decree and opinion in case No. 595.

The motion to advance the appeal and cross-appeal is filed in order that the same may be finally heard and determined within two years from the date of the entry of the amended final decree in case No. 595 and the seventeen other cases still pending in the Circuit Court of the United States for the Western District of Missouri, and for the

further reason that none of the said legislative enactments of the State of Missouri can, in the meantime, be enforced against the Chicago, Burlington and Quincy Railroad Company or the complainants in the seventeen other cases by reason of the fact, the final decree in this appealed case and all the other cases provides an appeal shall not supersede the injunctive portions of the decree and the appeal does not operate as a supersedeas. The early hearing and determination of this case on appeal and cross-appeal by this honorable Court is therefore a matter of vital interest and importance to the State of Missouri, its officers and citizens.

ELLIOTT W. MAJOR,
Attorney-General of the State of Missouri,
JOHN M. ATKINSON,
Assistant Attorney-General,
Counsellors for Appellants in Case No. 595 and
Counsellors for Appellees in Case No. 611.

FREDERICK W. LEHMANN,
SANDFORD B. LADD,
Of Counsel.

[Endorsed:] (21,821 and 21,837.) In the Supreme Court of the United States. October Term, 1909. John A. Knott et al., Appellants, *vs.* Chicago, Burlington & Quincy Railroad Company, and Chicago, Burlington & Quincy Railroad Company, Appellant, *vs.* John A. Knott et al. Motion to advance appeal and cross-appeal.

[Endorsed:] File Nos. 21,821, 21,837. Supreme Court U. S. October Term, 1909. Term Nos. 595 & 611. John A. Knott et al., &c., App'ts, *vs.* C., B. & Q. R. R. Co., and C., B. & Q. R. R. Co., App't, *vs.* John A. Knott et al., &c. Motion to advance appeal & cross-appeal. Filed February 10, 1910.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1910.

Office Supreme Court, U. S.
FILED.
MAR 20 1911
JAMES H. McKENNEY,
CLERK.

No. 336

JOHN A. KNOTT ET AL., Appellants,

vs.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, Appellee.

No. 334

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, Appellant,

vs.

JOHN A. KNOTT ET AL., Appellees.

Appeal (No. 336) and Cross-Appeal (No. 334) from the Circuit Court of the United States for the Western Division of the Western District of Missouri.

ANSWER TO AND SUGGESTIONS IN OPPOSITION TO THE MOTION OF APPELLEE IN CASE NO. 336 AND APPELLANT IN CASE NO. 334 TO SET ASIDE THE SUBMISSION IN SAID CASES.

ELLIOTT W. MAJOR,
Attorney-General of Missouri.
JOHN M. ATKINSON,
Assistant Attorney-General.
Counsellors for Appellants in Case No. 336 and Counsellors for Appellees in Case No. 334.

FREDERICK W. LEHMANN,
SANFORD B. LADD,
Of Counsel.

(21,821 and 21,837)

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1910.

No. 326

JOHN A. KNOTT ET AL., Appellants,

vs.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, Appellee.

No. 334

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, Appellant,

vs.

JOHN A. KNOTT ET AL., Appellees.

ANSWER TO AND SUGGESTIONS IN OPPOSITION TO TO THE MOTION OF APPELLEE IN CASE NO. 326 AND APPELLANT IN CASE NO. 334 TO SET ASIDE THE SUBMISSION IN SAID CASES.

Now come appellants in case number 326 and appellees in case number 334, both of which cases, same being appeal and cross-appeal, respectively, were argued and submitted to this Honorable Court on October 13, 1910, and present the following reasons and suggestions in opposition to the motion

of the Chicago, Burlington & Quincy Railroad Company to set aside said submission.

1. Because appeals were recently taken in the other seventeen cases by reason of the fact the two-year period within which an appeal in said cases could be allowed would expire at the latest on April 17, 1911. Doubtless, the views of the court, as they will be expressed in the opinion to be rendered in the case now under advisement, will be instructive, helpful and persuasive upon the future action of the parties in the seventeen cases just appealed, because some principles of law are involved which apply to all the cases. And this is true, although as to the facts each case must rest upon its own facts.

Ten cases (or counting the Chicago, Rock Island & Pacific Railroad Company and the St. Louis, Kansas City & Colorado Railroad Company cases as one, these two railroads being under the same management), nine cases were actually tried. One or more of the other eight cases were by stipulation and order of the court to abide the result in one or more of the nine cases tried. There was a separate and distinct finding of facts for each one of the nine cases tried. (Record, pages 5311, 5313, 5315-26.)

2. Because the question as to whether or not the rates fixed by the legislative enactments are confiscating or take the property of the Chicago, Burlington & Quincy Railroad Company without due process of law in the case submitted, is not affected in the least by the evidence received by the trial court applicable to each of the other cases, as each case was submitted and passed upon by the trial court separately and upon its own merits and with a separate finding of facts on the evidence peculiar to each case and separate decrees entered in each of the eighteen cases. Each case is reviewed here *de novo* and is determined by the evidence and proof, or want of proof, in each case, and each case must stand on its own merits.

3. Because, to sustain the motion would be tantamount to consolidating the case with the seventeen cases just appealed. Each case has its separate pleadings, evidence peculiar to that case, and its separate decree and facts found by the court as applying to such case.

4. Because, to sustain the motion would be to hold for naught at this late day that public interest, which manifestly caused this Honorable Court to sustain appellants' motion in case number 326 to advance said cause.

5. Because, the motion to set aside the submissions is obviously for the purpose of delay. The appellants in case number 326 were and are enjoined from the enforcement of the two-cent passenger rate law and certain freight rate laws by reason of the court holding that said laws were inoperative and unconstitutional, and the appeal does not supersede the injunctive portions of the decree. Delays operate against the interests of the officers and citizens of the State of Missouri, and the Chicago, Burlington & Quincy Railroad Company is not averse to delays, but on the other hand, seeks delays.

It opposed the motion to advance the appeal and cross-appeal submitted, and again it sought, at this same term, and before the submission of said causes, to have the submission postponed, and which motion was by this Honorable Court overruled.

6. Because the Chicago, Burlington & Quincy Railroad Company traverses a large part of the State of Missouri, more so than any other railroad in the State, and serves a large part of the citizens of the State, and if the cause is to be reversed and the final decree and amended final decree set aside and the injunction dissolved and the original amended and supplemental bills dismissed, the State, the officers and the citizens of the State, are entitled to the relief which such action would give without unnecessary delay.

7. Because the interests of the State of Missouri, the

officers and its citizens would suffer by reason of the long delay in preparing the record in the seventeen other cases and having same printed, and in the filing and hearing of motions to advance. Proper transcripts in the seventeen cases cannot be brought here "within a few days," as asserted in the motion of the Chicago, Burlington & Quincy Railroad Company (page 7 of the motion). Aside from this the cases could not be of benefit to the court in passing upon the cases already submitted.

8. Because said laws not being enforceable, the Chicago, Burlington & Quincy Railroad Company has been, and is now, collecting and receiving exorbitant and illegal charges both for passenger and freight traffic in the State of Missouri, and will continue so to do until this case is determined.

9. Because subdivision (e) of the motion to set aside the submission (p. 4 of the motion) discloses there were and are eighteen separate suits instituted by eighteen separate complainants, and that the court entered eighteen separate decrees. The case submitted to the court on October 13, 1910, must stand or fall upon its own pleadings and evidence, and not on the pleadings and evidence peculiar to the other cases tried.

10. Because this Honorable Court has had the case under advisement for over five months, and it may now be ready to render its decision and dispose of the case. The laws involved are of great and vital public interest, and a delay should not be favored. The delay would bring the court no more light nor affect the Chicago, Burlington & Quincy Railroad Company only as it might profit in being able to charge the higher rates during the delay, should its motion be sustained.

We take it that the motion filed to set aside said submissions will not be considered seriously by this Honorable Court by reason of the fact that the motion is utterly lacking in merit. That the suggestions offered in support of the motion

or application are so manifestly out of tune with the law, equity and right of the matter that it will in no sense appeal to the court. The examination of such questions of fact as are involved in each case requires great labor upon the part of the court, and to attempt to consider along with the case submitted the other cases, would burden the court and tend only to confuse rather than to afford or furnish the court with any light or information in considering the case already submitted.

For the reasons herein assigned, we ask this Honorable Court to refuse to set aside the submissions and to deny the motion.

Respectfully submitted,

ELLIOTT W. MAJOR,
Attorney-General of Missouri.
JOHN M. ATKINSON,
Assistant Attorney-General.
Counsellors for Appellants in Case Number 326, and
Counsellors for Appellees in Case Number 334.

FREDERICK W. LEHMANN,
SANFORD B. LADD,
Of Counsel.

V

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1910.

JOHN A. KNOTT *et al.*,
Appellants,
v.
CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY,
Appellee.
No. 826.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY,
Appellant,
v.
JOHN A. KNOTT *et al.*,
Appellees.
No. 334.

Appeal (No. 326) and Cross-Appeal (No. 334) from the Circuit Court of the United States for the Western Division of the Western District of Missouri.

MOTION TO SET ASIDE SUBMISSION.

Now comes the Chicago, Burlington & Quincy Railroad Company, and respectfully moves the court to set aside the submission heretofore made herein, and to set the cases for argument with

the other like cases tried at the same time upon the same evidence, but which have, since the submission herein, been also appealed The facts upon which this motion is based and the reasons therefor are:

(a) *Appeal in case No.* 326.

Case No. 326 is an appeal by the Railroad Commissioners and Attorney General of Missouri, seeking to reverse a decree of the Circuit Court of the Western Division of the Western District of that state in favor of the Chicago, Burlington & Quincy Railroad Company, enjoining the enforcement of the two-cent passenger and the freight carload maximum state statutory rates because as a matter of fact they were confiscatory.

(b) *Cross Appeal in case No.* 334.

Case No. 334 is a cross appeal in the same case, seeking, as a matter of precaution and to have certain other questions decided, to review the action below refusing to hold that the rates were invalid regardless of their confiscatory nature, so that the result below would, if necessary, be maintained on grounds other than those there adopted.

(c) *Submission heretofore made.*

Upon the application of the state these cases were advanced and were argued and submitted upon October 13, 1910, but have not since been decided.

(d) *Eighteen separate cases were together instituted and determined below and one only at first appealed, argued and submitted in an attempt to obtain an unfair advantage.*

In the original brief counsel made this protest against the advantage of singling out one case out of eighteen.

"In the court below each of the eighteen railroad companies having more than 45 miles of road in Missouri, obtained, after final hearing, a decree permanently enjoining the enforcement against it of certain state freight and passenger rate statutes found from 5027 printed pages of evidence (Rec., 213-5240) to be confiscatory. (Opinion, Rec., 5285, findings of fact, Rec., 5305; *St. L. & S. F. R. Co.* v. *Hadley*, 168 Fed. Rep., 419; Rec. 5368, 5370, 5275; 159 Fed. Rep., 220; Rec., 5279.) Case No. 326 is an appeal by defendants from the decree in favor of the Chicago, Burlington & Quincy Railroad Company *only*, while case No. 334 is a cross appeal in the same case. No appeal was taken in the other seventeen cases. A motion to advance was here filed and sustained. The record consists of five large volumes comprising 5339 printed pages, of which 133 pages represent all the pleadings, orders and decrees (Rec. 1-54, 61-94, 95-106, 114-116, 5240-5268) separately made in the cases appealed; the remaining 5206 printed pages (Rec. 54-58, 60-61, 94-95, 106-114, 116-213, 5268-5330) represent the portions of the record in the parts of the proceedings common to the entire eighteen cases, and *all* the evidence taken in *all* the cases (Rec. 213), 3651 pages of which were taken in other cases (Missouri Pacific, Rec. 1464-2582; Wabash, Rec. 2583-3685; St. Louis & San Francisco and eight other companies, Rec. 3687-3731, 3767-3742, 4782-5096, 5106-5190, 5226-5239.) There would, therefore, have been little expense, comparatively, to have taken appeals in the other seventeen cases, or to have separately printed only that portion of the evidence applicable to this case. The whole railroad situation in the state would have been presented by appealing all the cases. As it is, the court and counsel must grope through a record applicable to many roads in order to single out and apply such facts only as relate to one. The value of each railway property (Finding, Rec. 5315) and the earnings therefrom and expenses thereof (Findings, Rec. 5315-5326) and actual losses (id.) are entirely different, so that the facts might show that a rate law was confiscatory as to one company and not as to any other, though here confiscation existed as to all. Therefore, the appeal in the Chicago, Burlington & Quincy case *alone* is necessarily prosecuted upon the theory that it is for some reason the *best* road for the appellants' side of the controversy, its earnings being larger (Finding, Rec. 5315-5326),

and its interstate business proportionately greater than that of any other company, while its stock and bond issue (Rec. 1383) per mile and much lower. It is also the only road the passenger mileage of which is greater than the revenue, a feature, which in the argument, will cut some figure. The short line necessarily fixes the rate across Missouri (Exhibit 4, Rec., 4806; Finding 3, Rec., 5306.) This is the C. B. & Q. with a distance of 200 miles; other roads must carry across the state 280 miles. The mileage rate gives returns only upon 200 miles; the long road to obtain this return must go to the expense of carrying 80 miles farther. A fair test would have been one case, one agreed to as such, or one actually representative of average condition. Fairer still would be a presentation of all the cases. *An agreement for a test case was not even requested.* This one case is certainly not any fair test of the state rate legislation applicable to all roads. No favor was extended in not appealing the other cases. While the cases involve interests somewhat public in their nature, there is actually involved in the decree from which the appeal is prosecuted only the validity of the state rates as to *one* railroad. As the cases were tried below together and upon the same evidence singling out of the case of one company tends to confusion."

(e) *Numbers and names of the prevailing complainants in the eighteen cases below, with abbreviations commonly used.*

These are:

No. 2988, St. Louis and San Francisco Railroad Company (St. L. & S. F. R. Co.)

No. 2989, The Atchison, Topeka and Santa Fe Railway Company (A. T. & S. F. R. Co.)

No. 2990, The St. Louis Southwestern Railway Company (St. L. S. W. R. Co.)

No. 2991, The Chicago, Rock Island and Pacific Railway Company (C. R. I. & P. R. Co.)

No. 2992, The St. Louis, Kansas City and Colorado Railway Company (St. L., K. C. & C. R. Co.)

No. 2993, The Kansas City Southern Railway Company (K. C. S. R. Co.)

No. 2994, The St. Louis & Hannibal Railway Company (St. L. & H. R. Co.)

No. 2995, The Missouri Pacific Railway Company (Mo. Pac. R. Co.)

No. 2996, St. Louis, Iron Mountain & Southern Railway Company (St. L. I. M. & S. R. Co.)

No. 2997, Missouri, Kansas & Texas Railway Company (M. K. & T. R. Co.)

No. 2998, Chicago, Burlington & Quincy Railroad Company (C. B. & Q. R. Co.)

No. 2999, Quincy, Omaha and Kansas City Railroad Company (Q. O. & K. C. R. Co.)

No. 3000, The Wabash Railroad Company (Wab. R. Co.)

No. 3001, The St. Joseph & Grand Island Railway Company (St. J. G. I. R. Co.)

No. 3002, Kansas City, Clinton & Springfield Railway Company (K. C. C. & S. R. Co.)

No. 3003, Chicago Great Western Railway Company (C. G. W. R. Co.)

No. 3004, Chicago, Milwaukee & St. Paul Railway Company (C. M. & St. P. R. Co.)

No. 3006, The Chicago & Alton Railroad Company (C. & A. R. Co.)

(f) *Findings of fact and decrees.*

The court below made one finding of fact (Rec., 5305-5327, 168 Fed. Rep., 317, 319-337) and filed opinions (Rec., 5286-5304, 168 Fed. Rep., 317, 3566; Rec., 5327-5330) covering all the cases though a separate decree (Rec., 5241-5243) was entered as to each complainant which, upon motion (Rec., 5244-5245) at the same term, was modified (Rec., 5245-5246) in some minor respects.

(g) *State's appeal of the Burlington case.*

The original decree (Rec. 5241-5243) of March 8, 1909, was upon April 17, 1909, and at the same term amended (Rec. 5246-5249) and an appeal (Rec. 5265-5268) taken therefrom upon July 28, 1909.

(h) *Subsequent appeals of the other cases.*

Upon March 6, 1911, the state applied for and was granted an appeal in each of these cases:

No. 2989-A. T. & S. F. Ry. Co. v. Jno. A. Knott *et al.;*
No. 2990-St. L. S. W. Ry. Co. v. Jno. A. Knott *et al.;*
No. 2993-K. C. So. Ry. Co. v. Jno. A. Knott *et al.;*
No. 2994-St. L. & H. Ry. Co. v. Jno. A. Knott *et al.;*
No. 2995-Mo. Pac. Ry. Co. v. Jno. A. Knott *et al;*
No. 2996-St. L., I. Mt. & So. Ry. Co. v. Jno. A. Knott *et al.;*
No. 2997-M. K. & T. Ry. Co. v. Jno. A. Knott *et al;*
No. 2999-Q. O. & K. C. R. R. Co. v. Jno. A Knott *et al.;*
No. 3001-St. J. & G. I. Ry. Co. v. Jno. A. Knott *et al.;*
No. 3002-K. C. C. & S. Ry. Co. v. Jno. A. Knott *et al.;*
No. 3006-C. & A. R. R. Co. v. Jno. A. Knott *et al.*

A cross appeal was taken in each of these cases by the railroad company.

In the remaining six cases, being those of
No. 2988-St. L. & S. F. R. R. Co. v. Jno. A. Knott *et al.;*
No. 2991-C. R. I. & P. Ry. Co. v. Jno A Knott *et al.;*
No. 2992-St. L., K. C. & C. Ry. Co. v. Jno. A. Knott *et al.;*
No. 3000 Wabash R. R. Co. v. Jno. A. Knott *et al.;*
No. 3003-C. G. W. Ry. Co. v. Jno. A. Knott *et al.;*
No. 3004-C. M. & St. P. Ry. Co. v. Jno. A. Knott *et al*
an application for an appeal was filed on March 6, 1911, but not presented because appellant desired time to obtain a severance as from certain parties the required notice having not then been

served. These six applications have by the court been, at the request of the state, set for March 20, 1911.

(i) *Reasons for this application.*

In the court below each of the eighteen railroads in the state obtained after one final hearing upon the same evidence a decree permanently enjoining the enforcement of certain state freight and passenger rates because confiscatory, a single finding of fact being made as to all the roads. The cases by consent were tried together and determined March 8, 1909, upon the same evidence.

Upon July 28, 1909, the state appealed one case, that of the C. B. & Q. R. Co., and obtained its advancement. It was here argued and submitted October 13, 1910, and has not yet been decided. Upon March 6, 1911, the state appealed eleven other cases, and the railway companies took cross appeals therein. In the remaining six cases applications for appeal were on the same day filed. Because a severance was desired and notice had not been served, these applications were at the request of the state, set for March 20, 1911, when the appeals will be taken and cross appeals prosecuted. All the evidence has been printed and is here. The only thing necessary to complete the record in the eighteen cases is to bring here a transcript of the pleadings and decrees in each of those cases. This can be done within a few days. Each company makes a different showing as to the value of property and the earnings and income thereof. The roads traverse different parts of the state. The entire rate situation in the state will then appear and can be tested by determining all the cases at one and the same time, whereas the C. B. & Q. case alone, determines, only that case and leaves the rest undetermined.

O. M. SPENCER,

FRANK HAGERMAN,

Solicitors for C., B. & Q. R. R. Co.

State of Missouri, Jackson County, ss.

Frank Hagerman upon oath says he is one of the solicitors for the Chicago, Burlington, & Quincy Railroad Company. He has read foregoing petition and the facts stated therein are to his knowledge true.

FRANK HAGERMAN,

Subscribed and sworn to before me this March 10, 1911, by Frank Hagerman. My commission expires the 7th day of June, 1914.

(Seal)

E. E. BALL,
Notary Public.

Notice is hereby given that the foregoing motion will be presented at the opening of court upon March 20, 1911, or as soon thereafter as counsel can be heard.

12

FILED.
OCT 10 1910
JAMES H. McKENNA
Clerk.

IN THE

SUPREME COURT OF THE UNITED STATES

JOHN A. KNOTT, H. R. OGLESBY and FRANK A. WIGHTMAN, Railroad and Warehouse Commissioners, and ELLIOTT W. MAJOR, Attorney General of the State of Missouri. *Appellants,*

v.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY.

No. 186

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, *Appellant,*

v.

JOHN A. KNOTT, H. R. OGLESBY and FRANK A. WIGHTMAN, Railroad and Warehouse Commissioners, and ELLIOTT W. MAJOR, Attorney General of the State of Missouri, *et al.*

No. 194

Motion for Postponement of Argument.

O. M. SPENCER,
FRANK HAGERMAN,
Solicitors for Chicago, Burlington & Quincy Railroad Company.

John C. Rowell, Printer, 722 Baltimore Ave., Kansas City, Mo.

IN THE

SUPREME COURT OF THE UNITED STATES

JOHN A. KNOTT, H. R. OGLESBY and FRANK A. WIGHTMAN, Railroad and Warehouse Commissioners, and ELLIOTT W. MAJOR, Attorney General of the State of Missouri, *Appellants*,

v.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY,

No. 326.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, *Appellant*,

v.

JOHN A. KNOTT, H. R. OGLESBY and FRANK A. WIGHTMAN, Railroad and Warehouse Commissioners, and ELLIOTT W. MAJOR, Attorney General of the State of Missouri, *et al.*

No. 334.

Motion for Postponement of Argument.

Now comes the Chicago, Burlington & Quincy Railroad Company and moves the court to postpone the argument of this case until sometime when it can be heard by nine judges, for that the lower court found the fact to be that the state rates in question necessarily fixed and determined the state rates, but in the opinion, held that since the state statutes did not upon their face purport so to do, it could not be said as a matter of law to interfere with interstate commerce.

Upon the cross appeal, No. 334, this is one of the chief errors assigned. The same question has been presented in the Minnesota Rate Cases, where the evidence of both parties was particularly directed to the point. It was there the subject of an elaborate report by a master, who held, both as a matter of fact and of law, that the state laws were void, because they did actually interfere with interstate commerce. A copy of that report is filed herewith.

In view of the importance of the question, the vast interests involved, and the number of parties interested in the result, the question is as important as any that has passed to the consideration of the full bench.

O. M SPENCER,
FRANK HAGERMAN,
Solicitors for Chicago, Burlington & Quincy Railroad Company.

Received a copy hereof and acknowledge receipt of notice that it will be presented at the opening of court upon October 10, 1910, or as soon thereafter as it can be heard.

Solicitors for the Attorney General and Railroad Commissioners.

13

Office Supreme Court
FEB 21 19
JAMES H. McKE

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1909.

JOHN A. KNOTT *et al.*,
Appellants,
vs.
CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY,
Appellee.
No. [redacted]

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY,
Appellant,
vs.
JOHN A. KNOTT *et al.*,
Appellees.
No. [redacted]

Appeal (No. 595) and Cross-Appeal (No. 611) from the Circuit Court of the United States for the Western Division of the Western District of Missouri.

Brief of C. B. & Q. R. R. Co. against motion to advance filed by appellants in No. 595 and appellees in cross-appeal No. 611.

O. M. SPENCER,
FRANK HAGERMAN,
Solicitors for the Chicago, Burlington & Quincy Railroad Company.

John C. Berard, Printer, 720 Baltimore Ave., Kansas City, Mo.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1909.

JOHN A. KNOTT *et al.*, *Appellants*,

vs.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, *Appellee*. — No. 595.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, *Appellant*,

vs.

JOHN A. KNOTT *et al.*, *Appellees*. — No. 611

Appeal (No. 595) and Cross-Appeal (No. 611) from the Circuit Court of the United States for the Western Division of the Western District of Missouri.

Brief of C. B. & Q. R. R. Co. against motion to advance filed by appellants in No. 595 and appellees in cross-appeal No. 611.

I.

The appeal and motion to advance.

In the court below each of the eighteen railroad companies in Missouri obtained, after final hearing, a decree permanently

enjoining the Railroad Commissioners, Attorney General and certain individual shippers and passengers from enforcing against it certain state freight and passenger rate statutes, found from 5027 printed pages of evidence (Rec., 213-5240) to be confiscatory. (Opinion Rec., 5285, and findings of fact, Rec., 5305; *St. L. & S. F. R. Co.* v. *Hadley*, 168 Fed. Rep., 317; on preliminary hearings, 161 Fed. Rep., 419; Rec. 5268, 5270, 5275; 155 Fed. Rep., 220; Rec., 5279.) Case No. 595 is an appeal by defendants from the decree in favor of the Chicago, Burlington & Quincy Railroad Company, *only*, while case No. 611 is a cross appeal in the same case. No appeal was taken in the other seventeen cases. A motion has been here filed to advance and set the case for April 4, 1910. The record consists of five large volumes comprising 5339 printed pages, of which 133 pages represent all the pleadings, orders and decrees (Rec., 1-54, 61-94, 95-106, 114-116, 5240-5268) separately made in the single case appealed; the remaining 5206 printed pages (Rec., 54-58, 60-61, 94-95, 106-114, 116-213, 5268-5330) represent records and all the evidence in the parts of the proceedings common to the entire eighteen cases. There would therefore have been little expense, comparatively, to have taken appeals in the other seventeen cases. It would be physically impossible to prepare a brief for the argument at this term.

II.

Appellants appealing the one case only do not present a fair test case:

The value of each railway property (Finding Rec., 5313) and the earnings therefrom and expense thereof (Rec., 5315-

5326) is entirely different, so that the facts might show that a rate law was confiscatory as to one company and not as to any other. Therefore, the appeal in the Chicago, Burlington & Quincy case, *alone*, is necessarily prosecuted upon the theory that it is the *best* road for the appellants' side of the controversy, its earnings being larger and operating expenses less than those of any other company. A fair test case would be one agreed to as such, or one actually representative of average conditions. *An agreement for a test case has not even been requested.* Appellee protests that this case is not any fair test, and hence resists the effort to have it advanced. No favor is being extended in not appealing any other case. The question comes within *Hoge* v. *Richmond, etc. R. Co.*, 93 U. S., 1; 23 L. Ed., 781, where an advancement was denied, though the case involved interests somewhat public in their nature, because there was actually involved therein only the validity of the state taxes of *one* railroad. The laws in question arbitrarily fixed mileage rates and were not those empowering the railroad commissioners to exercise, after a hearing, an honest judgment as to what rates would be reasonable (Revised Statutes Mo., 1899, secs. 1136, 1147-1151; Laws Mo., 1903, p. 132; Laws of Mo., 1907, p. 386).

III.

Neither rule 26 of this court nor any statute or decision justifies an advancement.

1. *Rule* 26.

Paragraph 1 of this rule requires cases to be called for argument "in the order in which they stand upon the docket." Criminal cases (par. 3) and cases once here adjudicated upon the merits

and brought back for subsequent hearing (par. 4) may, by special leave, be advanced. Revenue and other cases in which the United States are concerned, which also involve or affect some matter of general public interest, may also be advanced but only upon the motion of the Attorney General (par. 5). "No other case will be taken up out of the order on the docket, or be set down for any particular day except under special and peculiar circumstances" (par. 7). This exception in paragraph 7 has, however, no reference to the general subject of the *advancement* of cases, but was made to cover cases of unavoidable delays such, for instance, as a failure in reaching court or sickness of counsel, and like causes when a case is permitted to go to a later date, or take a later place upon the docket.

Under Rule 26, it has been held that no *advancement* can be had, unless the case is covered by some provision therein or by some law which *entitles* it to precedence even though both parties ask the advancement (*Miller* v. *New York*, 12 Wall., 159; 20 L. Ed. 259), the refusal to advance being the rule where, as here, one party objects (*Louisiana* v. *New Orleans*, 103 U. S., 521; 26 L. Ed., 307). So specific provision not being made therefor by the rules or some statute, a case will not be heard out of order, even though it involves important interests of a state (*B. & O. R. Co.* v. *Marshall Co.*, 131 U. S., XCIX, Appx.; 19 L. Ed., 452) No case will be advanced where only private interests are involved (*Sage* v. *Central R. Co.*, 93 U. S., 412; 23 L. Ed., 933), the only exception being when the question in dispute will embarrass the United States government while it is unsettled. (*U. S.* v. *Fossatt*, 21 How., 445; 16 L. Ed, 185). So an injunction against a tax levied under an ordinance does not make a case for advancement (*Davenport* v. *Dows*, 15 Wal., 390; 21 L. Ed., 96)

Though criminal cases are specifically provided for by paragraph 3, still there can be no advancement thereof unless the government will be embarrassed by the delay (*U. S.* v. *Norton*, 91 U. S., 558; 23 L. Ed., 250); none upon a motion of the defendant, if he is not in jail (*Ward* v. *Maryland*, 12 Wal., 163; 20 L. Ed., 260).

It being, therefore, manifest that no right to an advancement can be found in the rules of this court, we turn to the statutes bearing upon the subject.

2. *Statutes other than section* 949.

Writs of error in federal capital cases must be advanced (25 Stat. L., 656, Sec. 6; Rose's Code, Sec. 2040; 1 U. S. Compiled Stat., p. 570; 4 Fed. Stat. An., 491). Cases to reverse judgments of state courts in criminal cases have precedence over all, except government cases, and those which the court may decide to be of public importance (Rev. Stats., 710; Rose's Code, Sec. 2041; 1 U. S. Compiled Stat., p. 576). Priority is given to cases reviewing the circuit court as to holdings of the Board of General Appraisers in revenue cases (26 Stat. L., 138; Rose's Code, Sec. 2042; 2 U. S., Compiled Stat., p. 1934; 2 Fed. St. An., 627); over all except criminal cases, to proceedings to enforce orders of the Interstate Commerce Commission other than for the payment of money (24 Stat. L., 376, as ameneded, 34 Stat. L., 592; Rose's Code, Secs. 63, 2043; 1909 Supp. Compiled Stat. U. S., 1162; Supp. 1909 Fed. Stat. An., 270); to suits to enjoin, set aside, annul or suspend any order or requirement of the Commission, and to appeals from any interlocutory order or decree granting or continuing an injunction (34 Stat. L., 592; Rose's Code, Sec. 2043; 1909 Supp. U. S. Compiled Stat., 1162;

Supp. 1909 Fed. Stat. An., 270). Precedence in the circuit court of appeals is given to appeals from an interlocutory order granting or continuing an injunction or appointing a receiver (31 Stat. L., 660; 1 U. S. Compiled Stat., 551; 4 Fed. Stat. An., 422). An appeal or writ of error may be advanced when taken under the Acts of February 6, 1889 (Rose's Code, Sec. 2054; 25 Stat. L., 656; 1 U. S. Compiled Stat., 569; 4 Fed. Stat. An., 491), and March 3, 1891 (26 Stat. L., 827; 1 U. S. Compiled Stat., 549; 4 Fed. Stat. An., 398) as amended (29 Stat. L., 492; 1 U. S. Compiled Stat. 549; 4 Fed. Stat. An., 433) upon a question of jurisdiction, provided that is the sole question for review. (*Aspen Mining Co.* v. *Billings*, 150 U. S., 34, 37; 37 L. Ed., 988).

It is at once apparent that none of these statutes apply to this case.

3. *Section 949 of the Revised Statutes.*

(a) In 1869, under the then Rule 30, now 26, it was held (*B. & O. R. Co.* v. *Marshall Co.*, 131 U. S., XCIX; 19 L. Ed., 452) that there could be no advancement of case because it involved important interests of a state. Thereupon, there was passed the Act of June 30, 1879 (16 Stat. L., 176), now Section 949 of the Revised Statutes (Rose's Code, Sec. 820; 1 U. S. Compiled Stat., 695; 4 Fed. Stat. An., 594), providing that cases where *the state is a party*, or the revenue law of a state enjoined, it shall have precedence over civil cases. Unless this section applies to this case there is no statutory authority for an advancement.

(b) If the state is a party, then injunction would not lie (*Fitts* v. *McGhee*, 172 U. S., 416; 43 L. Ed., 535), but a suit like this, against a state officer, to enjoin the enforcement of a state rate schedule is not one against a state. *Ex parte Young*, 209 U. S. 123; 52 L. Ed., 714). So in this case below the de-

fendants claimed that the suit was against the state, but upon the same reasoning adopted in *Ex Parte Young*, *supra*, the court, before and after that decision, held that it was not (*St. Louis & S. F. R. Co.* v. *Hadley*, 155 Fed. Rep., 220, 224; 161 Fed. Rep., 419, 422; 168 Fed. Rep., 317, 339; Rec., 5274, 5278, 5282, 5287). The suit then not being one where the *state is a party*, it is not within Section 949. Not being within that section, it is no reason for an advancement that important interests of the state are involved (*B. & O. R. Co.* v. *Marshall Co.*, 131 U. S. XCIX; 19 L. Ed., 452).

(c) Even as to a suit to which a state is party, section 949 is not imperative, but simply vests a discretion in this court (*Hoge* v. *Richmond etc. R. Co.*, 93 U. S., 1; 23 L. Ed., 781), so that an advancement has been denied where an injunction sought against state taxes affected only one railroad company and did not embarrass the state's governmental capacity (*id.*). Nor will it be granted where the state is in reality but a nominal party, as in *quo warranto* against corporate directors (*Miller* v. *New York*, 12 Wal., 159; 20 L. Ed., 259). So the section will not be applied in any case to which the state is an *actual* party unless "the operations of the government of the state will be embarrassed by delay" (*Central R. Co.* v. *Bourbon Co.*, 116 U. S., 538; 29 L. Ed., 725).

IV.

But upon the facts there is no reason for the advancement, if the case were within rule 26, or any act of Congress.

1. If, however, either rule or statute contemplated the advancement of a case like this, still it is difficult to see any reason

for the exercise of the discretion of the court in that respect. The record is so voluminous that a somewhat detailed statement becomes necessary, more especially because all the cases below were, for reasons not disclosed by the record, so prolonged and delayed by defendants that they are not entitled to much consideration in now moving to advance *a single case* out of many not appealed. The burden is upon the other side to show a sufficient reason for the exercise here of a discretion. No such showing has been made. A mere statement of the record will show that the case is not one where there could be such a showing.

2. On June 16, 1905, the Chicago, Burlington & Quincy Railway Company (Rec., 1), and each of the seventeen other railways in the state (Rec., 5279-5280), filed in the circuit court of the United States for the Western District of Missouri, a bill to enjoin the enforcement of a state maximum freight law of 1905 (Laws of Missouri, pp. 102-104, Rec., 6-7). The record in the cases of the Chicago Burlington & Quincy Railway Company discloses the facts now to be recited and that the orders (Rec., 60-61, 94-95, 106-114, 116-213) and opinions (Rec., 5268-5330) are common to the eighteen cases and that evidence (Rec., 213-5240) was taken in *all* the cases. A short restraining order (Rec., 15) was issued June 16, 1905, which by consent (Rec., 16) was upon June 27, 1905, continued in force till the hearing for a temporary injunction. Defendants, not then having controverted the allegations of the bill as to the confiscatory nature of the rates, the restraining order (Rec., 19) was, upon July 12, 1905, continued in force as a temporary injunction (Rec., 19-20), defendants consenting to a bond without surety. The opinion upon this application, not appearing in the record, will be separately printed. A demurrer (Rec., 21-26) without affidavit, as re-

quired by rule, was on Aug. 7, 1905, filed. Upon October 14, 1905, defendants filed (Rec., 21) complainants' waiver of an affidavit, and upon the same day (Rec., 21) the demurrer was submitted and overruled and defendants took until the November, 1905, Rules to answer. Unverified answers were filed by the railroad commissioners (Rec., 28-37) upon November 28, 1905 (Rec., 27), by the Attorney General (Rec., 37-47) upon December 1, 1905 (Rec., 37), and individual shippers (Rec., 47-49) who were defendants upon December 2, 1905 (Rec., 47), nearly six months after filing the bill. Upon February 17, 1906, by *consent* of defendant's counsel, complainant filed replications (Rec., 50-52), the case becoming at issue, eight months after its institution. Upon February 26, 1906 (Rec., 52) defendants filed a motion (Rec., 53), for a reference to a special master. Upon February 27, 1906 (Rec., 53), complainants in the eighteen cases filed a motion (Rec., 54-56) for a hearing upon evidence to be orally adduced in open court, defendants' counsel consenting (Rec., 56) that the motion should be treated as if filed separately in each one of the cases. The master called the parties together April 11, 1906 (Rec., 214) when, by consent, an adjournment was taken to June 11, 1906. At that time a conference (Rec., 215-228) between counsel resulted in an adjournment (Rec., 228) to July 16, 1906. The record is silent as to any other action had before (Rec., 228) September 7, 1906, when one witness was examined (Rec., 228-241) in the Burlington case No. 2998 below and an adjournment taken until (Rec., 241) September 17, 1906. Evidence was then taken in the Burlington case, with various adjournments, until April 17, 1907, when (Rec., 1134) it was completed.

3. In the Missouri Pacific case, No. 2995, the taking of

evidence began (Rec., 1465) January 14, 1907, and was completed April 17, when defendants (Rec., 2359-2360) closed their case and both parties rested.

4. The Wabash case, No. 3000 below was called (Rec., 2583) on September 7, 1906, and by consent taken up November 20, 1905 (Rec., 2584), and continued (Rec., 2584-3322) until April 2, 1907, when it was closed (Rec., 3322). The Special Master then set the argument upon these three of the cases before him for June 18, 1907, which was two years and two days after the institution of the suit. This delay is of some significance in view of the fact that all the cases were disposed of in a trial before the court beginning November 9 and ending December 30, 1908, parts of only 17 days representing the time actually occupied in taking all the evidence. (Nov. 9-14, Rec., 3750-4138; Dec. 14-19, Rec., 4138-4489; Dec. 22-23, Rec., 4489-4634; Dec., 28-30, Rec., 4634-4781).

5. When the freight rate law of 1905 (Laws Mo., 1905, Rec., 2450-2451) was passed, Governor Folk approved the act with great reluctance and impliedly invited litigation to determine the reasonableness of the rates, so that the railroad commissioners fully empowered to fix rates (Rev. Sts. Mo., 1899, secs. 1136, 1147-1151; Laws Mo., 1903, p. 132; Laws Mo., 1907, p. 386) or the next legislature could fix reasonable rates in the light of decisions made. The legislature of 1907 met, after much of the evidence had been taken in the Burlington and Wabash cases, showing that the rates fixed in 1905 were unreasonable. The governor then in a general (Rec., 2449-2450) and afterwards in a special message (Rec., 2450) urged the repeal of the Act of 1905, be-

cause it was defective and had been shown by the testimony to be in some respects illegal and unjust. The legislature (Laws Mo., 1907, p 171; Rec., 64) then passed a new maximum freight law, increasing the rates fixed by the Act of 1905, and repealing all of the latter *except the penalties* incurred thereunder, thus making it necessary for complainants to continue the litigation even as to the old act. About the same time another act (Laws 1907, p. 170; Rec., 69) was passed reducing the passage rate from three to two cents per mile, the sum total of legislative action being to reduce the entire earnings below what they would have been under existing laws. Thereupon, each of the eighteen railway companies, by leave of court, filed amended and supplemental bills (Rec., 5268, 5270, 5275) to enjoin the enforcement of these new laws. Upon June 17, 1907, the court refused (Rec., 5275; 155 Fed Rep., 220), pending a test ordered by it, to grant a temporary injunction against the passenger rate, but, *by consent of defendants* (Rec., 3748) granted such temporary injunction against the new maximum freight law, the defendant consenting (Rec., 61) that the nominal bonds (Rec., 20) theretofore filed without sureties should stand as a bond upon this order. Although the full merits of the amended and supplemental bills had been argued and an opinion filed on June 17, 1907 (155 Fed. Rep., 220; Rec., 5268, 5270, 5275) the defendants waited from June until August and September, 1907, when they filed (Rec., 82-92) demurrers which were never argued until (Rec., 94) April 10, 1908, when they were denied. Answers were filed by the Attorney General (Rec., 95-103) and Railroad Commissioners (Rec., 103-104) upon May 12, 1908 (Rec., 95, 103), nearly a year after the filing of the supplemental bills. These were after-

wards (Rec., 213) adopted by the individual shippers and passengers who were defendants. Replications were filed (Rec., 104, 105) on June 1, 1908, so that thus the case was put at issue practically one year after the filing of the supplemental bills. On June 8, 1908, notices were served (Rec., 113) by ten of the companies, for a hearing of their applications for temporary injunctions The defendants (Rec., 114) *insisted* "that such hearing be postponed for a period of ninety days." It was then by the agreement of all parties ordered (Rec., 114) that the applications for temporary injunctions be deferred and in lieu thereof, *all* of the eighteen cases should be set for October 5, 1908, for final hearing upon oral and documentary testimony to be adduced in open court, and that which had already been taken before the master in these cases. Upon October 5, 1908, over complainants' protest and at defendant's request, the cases were continued (Rec., 117, 3750) until November 9, 1908, at which time the taking of evidence was begun and continued until November 14, when (Rec., 4138) upon the court's own motion, adjournment was taken until December 14. Thereafter, with various adjournments, the evidence was completed, written out and certified to on December 30th, 1908 (Rec., 171, 4781) upon which day the case was finally submitted; parts of only 17 days having been consumed in taking the evidence.

Upon March 8, 1908, findings of fact were made (Rec., 5205) and a decree (Rec., 5241) entered for each of the eighteen complainants on the sole ground that the rates were confiscatory an elaborate opinion accompanying the decrees (Rec., 5285; 168 Fed. Rep., 317). These decrees were upon motion by complainants, at the same term, on April 17, 1909, amended (Rec., 5246)

in some minor respects. Upon July 28, 1909, the defendants appealed (Rec., 5267) the case of the Chicago, Burlington & Quincy Railway Company alone. No appeal was taken in any of the remaining seventeen cases. The complainant, in that *one* case, upon September 18, 1909, took (Rec., 5334) a cross appeal on the grounds that the decree below could be, as to it, upheld for the grounds that the appeal below could be, as to it, upheld for reasons (Rec., 5335) other than that the rates were confiscatory, which grounds appear from the pleadings and finding of fact, but are wholly unnecessary to be considered until the case which the defendants appealed is heard.

6. The interest of the Chicago, Burlington & Quincy Railway Company pending the litigation passed to the Chicago, Burlington & Quincy Railroad Company, and Elliott W. Major succeeded Herbert S. Hadley as Attorney General. By consent orders (Rec., 115, 172) were entered substituting such parties as such successors.

7. While the record does not set forth the form of the orders therefor, yet the facts are recited in the transcript that *in the trial below* (not upon any appeal), the case of the St. L. & S. W., No. 2990 was (Rec., 4686) to abide that of the St. L., I. M. & S., No. 2996; those of the Missouri Pacific, No. 2995, St. L., I. M., & S., No. 2996, Wabash, No. 3000, and Chicago & Alton, No. 3006 were (Rec., 4712, 4713, 4723, 4724) to abide that of the Burlington, No. 2998, those of the Q. O. & K. C., No. 2999, and St. J. & G. I., No. 3001, that (Rec., 4723-4724) of the C. G. W., No. 3003, and that of C. M. & St. P., No. 3004, that (Rec., 4724) of the St. L. & S. F., No. 2988.

Upon this state of the record, it is apparent that this case should not be advanced.

Respectfully submitted,

O. M. SPENCER,

FRANK HAGERMAN,

Solicitors for the Chicago, Burlington & Quincy Railroad Company.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1911.

672 Knott *et al.* v. St. L. & S. F. R. Co.
673 St. L. & S. F. R Co. v. Knott *et al.*

674 Knott *et al.* v. A., T. & S. F. Ry. Co.
675 A., T. & S. F. Ry. Co. v. Knott *et al.*

676 Knott *et al.* v. St. L. & S. W. Ry. Co.
677 St. L. S. W. R. Co. v. Knott *et al.*

678 Knott *et al.* v. C., R. I. & P. Ry. Co.
679 C., R. I. & P. R. Co. v. Knott *et al.*

680 Knott *et al.* v. St. L., K. C. & C. R. Co.
681 St. L., K. C. & C. R. Co. v. Knott *et al.*

682 Knott *et al.* v. K. C. So. R. Co.
683 K. C. So. R. Co. v. Knott *et al.*

684 Knott *et al.* v. St. L. & Hannibal R. Co.
685 St. L. & Hannibal R. Co. v. Knott *et al.*

686 Knott *et al.*v. Mo. Pac. R. Co.
687 Mo. Pac. R. Co. v. Knott *et al.*

688 Knott *et al.* v. St. L., I. M. & S. R. Co.
689 St. L., I. M. & S. R. Co. v. Knott *et al.*

690 Knott *et al.* v. M. K. & T. R. Co.
691 M., K. & T. R. Co. v. Knott *et al.*

692 Knott *et. al.* v. Q. O. & K. C. R. Co.
693 Q., O. & K. C. R. Co. v. Knott *et al.*

694 Knott *et. al.* v. Wabash R. Co.
695 Wabash R. Co. v. Knott *et al.*

696 Knott *et. al.* v. St. J. & G. I. R. Co.
697 St. J. & G. I. R. Co. v. Knott *et al.*

698 Knott *et al.* v. K. C., C. & S. R. Co.
699 K. C., C. & S. R. Co. v. Knott *et al.*

700 Knott *et al.* v. C. G. W. R. Co.
701 C. G. W. R. Co. v. Knott *et al.*

702 Knott *et al.* v. C., M. & St. P. R. Co.
703 C., M. & St. P. R. Co. v. Knott *et al.*

704 Knott *et al.* v. C. & A. R. Co.
705 C. & A. R. Co. v. Knott *et al.*

Appeals (even numbers) and Cross Appeals (odd numbers) from the Circuit Court of the United States for the Western Division of the Western District of Missouri.

MOTION TO ADVANCE.

Now come each of the railway companies above named and move the court to advance each of the above entitled Missouri rate

cases for hearing with cases Nos. 130 and 134, known as the C. B. & Q. Missouri rate case, for these reasons:

(1) *This motion.*

A motion has been made to advance cases 130 and 134. The suggestions against the motion are to the effect that there should be no advancement of those cases unless these are also advanced and heard with them. Those suggestions are hereby referred to in support hereof as if reincorporated herein in support hereof.

(2) *Appeal in case No.* 130.

Case No. 130 is an appeal by the Railroad Commissioners and Attorney General of Missouri, seeking to reverse a decree of the Circuit Court of the Western Division of the Western District of that state in favor of the Chicago, Burlington & Quincy Railroad Company, enjoining the enforcement of the two-cent passenger and the freight carload maximum state statutory rates because as a matter of fact they were confiscatory.

(3) *Cross Appeal in case No.* 134.

Case No. 134 is a cross appeal in the same case, seeking, as a matter of precaution and to have certain other questions decided, to review the action below refusing to hold that the rates were invalid regardless of their confiscatory nature, so that the result below would, if necessary, be maintained on grounds other than those adopted below.

(4) *Submission heretofore made.*

Upon the application of the state that appeal and cross appeal were advanced, argued and submitted upon October 13, 1910.

(5) *Eighteen separate cases were together instituted and determined below and one only at first appealed, argued and submitted. A hearing of one only might give an unfair advantage to the state.*

In the original brief in the C. B. & Q. case counsel made a protest against the advantage of singling out one case out of eighteen. This is set forth in the suggestions against the state's motion to advance the case of that company.

(6) *Numbers and names of the prevailing complainants below in the eighteen cases, with abbreviations commonly used in the record.*

These are:

No. 2988, St. Louis and San Francisco Railroad Company (St. L. & S. F. R. Co.)

No. 2989, The Atchison, Topeka and Santa Fe Railway Company (A. T. & S. F. R. Co.)

No. 2990, The St. Louis Southwestern Railway Company (St. L. S. W. R. Co.)

No. 2991, The Chicago, Rock Island and Pacific Railway Company (C. R. I. & P. R. Co.)

No. 2992, The St. Louis, Kansas City and Colorado Railway Company (St. L., K. C. & C. R. Co.)

No. 2993, The Kansas City Southern Railway Company (K. C. S. R. Co.)

No. 2994, The St. Louis & Hannibal Railway Company (St. L. & H. R. Co.)

No. 2995, The Missouri Pacific Railway Company (Mo. Pac. R. Co.)

No. 2996, St. Louis, Iron Mountain & Southern Railway Company (St. L. I. M. & S. R. Co.)

No. 2997, Missouri, Kansas & Texas Railway Company (M. K. & T. R. Co.)

No. 2998, Chicago, Burlington & Quincy Railroad Company (C. B. & Q. R. Co.)

No. 2999, Quincy, Omaha and Kansas City Railroad Company (Q. O. & K. C. R. Co.)

No. 3000, The Wabash Railroad Company (Wab. R. Co.)

No. 3001, The St. Joseph & Grand Island Railway Company (St. J. G. I. R. Co.)

No. 3002, Kansas City, Clinton & Springfield Railway Company (K. C. C. & S. R. Co.)

No. 3003, Chicago Great Western Railway Company (C. G. W. R. Co.)

No. 3004, Chicago, Milwaukee & St. Paul Railway Company (C. M. & St. P. R. Co.)

No. 3006, The Chicago & Alton Railroad Company (C. & A. R. Co.)

(7) *Findings of facts and decrees.*

The court below made one finding of fact (168 Fed. Rep., 317, 319-337) and filed opinions (168 Fed. Rep., 317, 356) covering all the cases though a separate decree was entered as to each complainant which, upon motion at the same term, was modified in some minor respects.

(8) *State's appeal of the C. B. & Q. case.*

The original decree of March 8, 1909, was upon April 17, 1909, and at the same term amended and an appeal taken therefrom in the C. B. & Q. case upon July 28, 1909.

(9) *Subsequent appeals of the other cases.*

The decrees in the other seventeen cases were entered at the same time as that in the C. B. & Q. case. Immediately prior to the expiration of the two years in which to appeal, the state in March, 1911, applied for and was granted appeals in each of the other seventeen cases. These applications were granted and cross appeals taken. All are here docketed, entitled as shown at the caption, the appeals and cross appeals making thirty-four cases numbered 672 to 705 inclusive.

(10) *Prompt action here by the railroads.*

Immediately upon the taking of the appeals in these other cases, the C. B. & Q. R. Co. upon March 20, 1911, filed here a motion setting forth the foregoing facts and asking the court to set aside the submission of its case and restore it for argument with the other seventeen cases so that the entire rate situation in Missouri would be before the court at the same time. While this motion, as made, was, upon April 3, 1911, denied, yet upon the following Monday, March 10, 1911, the court, of its own motion, set aside the submission and restored those cases for oral argument. No order was made for advancement and no mention was, by the court, made of the other appeals for the manifest reason that they had not then been docketed. Now that they are here it seems to be only fair to have them all heard at the same time.

(11) *Reasons for these suggestions.*

The case then is this: In the court below each of the eighteen railroads in the state obtained, after one final hearing upon the same evidence, a decree permanently enjoining the enforcement of certain state freight and passenger rates because confiscatory,

a single finding of fact being made as to all the roads. The cases by consent were tried together and determined in March, 1909, upon the same evidence. Upon July 28, 1909, the state appealed one case, that of the C. B. & Q., and obtained its advancement. It was here argued and submitted October 13, 1910, but not decided. In March, 1911, the state appealed the other seventeen cases, and the railway companies took cross appeals therein. The C. B. & Q. then asked the court to reinstate its case for argument so that all the eighteen cases could be heard at the same time. The court, without giving any reason for its action, set aside the submission and restored the case for argument. The remaining seventeen cases are now here. All the evidence is contained in the record in the C. B. &. Q. case for use in all the cases, the record in each of the seventeen cases by stipulation containing only the pleadings and decrees in each. Each company makes a different showing as to the value of property and the earnings and income thereof. The roads traverse different parts of the state. The entire rate situation in the state will appear and can be better tested by determining all the cases at one and the same time, whereas the C. B. & Q. case alone determines only that case and leaves the rest undetermined. One should not therefore be heard without the others.

FRANK HAGERMAN,
Solicitor for the Railway Companies named in the caption, appellees and cross appellants.

State of Missouri, Jackson County, ss.

Frank Hagerman, upon oath says he is the solicitor for the appellee railway companies and cross appellants named in the caption. He has read foregoing motion and the facts stated therein are to his knowledge true.

FRANK HAGERMAN.

Subscribed and sworn to before me this October 3rd, 1911, by Frank Hagerman. My commission expires the 7th day of June, 1914.

E. E. BALL,

(Seal) *Notary Public.*

Notice is hereby given that the foregoing motion will be presented at the opening of court upon October 9, 1911, or as soon thereafter as counsel can be heard.

IN THE 73

Supreme Court of the United States

OCTOBER TERM, 1911.

Office Supreme Court, U. S.
FILED.
OCT 9 1911
JAMES H. McKENNEY
CLERK

NO. ~~672~~ 339

JOHN A. KNOTT ET AL, Appellants,

v.

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, Appellee.

NO. ~~673~~ 340

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, Appellant,

v.

JOHN A. KNOTT ET AL., Appellees.

And sixteen other cases wherein said Knott et al., are appellants, and wherein in each case one of sixteen other railroads has taken a cross-appeal, making sixteen other appeals and sixteen cross-appeals, and which cases are Nos. 674 to 705, inclusive, of this term's docket, and which cases, together with the above cases, are all separately styled and numbered within.

Appeals and Cross-appeals in Seventeen Cases from the Circuit Court of the United States for the Western Division of the Western District of Missouri.

ANSWER TO AND SUGGESTIONS IN OPPOSITION TO THE MOTION OF CROSS-APPELLANTS' (THE RAILROADS) TO ADVANCE THE SEVENTEEN APPEALS AND CROSS-APPEALS.

ELLIOTT W. MAJOR,
Attorney-General of Missouri,
Counselor for Appellants in the Seventeen Cases on Appeal and Counsellor for Appellees in the Seventeen Cases on Cross-Appeal.

(22748 TO 22781 INCLUSIVE.)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1911.

No. 672. Knott et al., Appellants, v. St. Louis, & San Francisco R. R. Co.	Appeal
No. 673. St. Louis & San Francisco R. R. Co., Appellant, v. Knott, et al.	and Cross-appeal.
No. 674. Knott et al., Appellants, v. Atchison, Topeka & Santa Fe Ry. Co.	Appeal
No. 675. Atchison, Topeka & Santa Fe Ry. Co., Appellant, v. Knott et al.	and Cross-appeal.
No. 676. Knott et al., Appellants, v. St. Louis & San Southwestern Ry. Co.	Appeal
No. 677. St. Louis & Southwestern Ry. Co., Appellant, v. Knott et al.	and Cross-appeal.
No. 678. Knott et al., Appellants, v. Chicago, Rock Island & Pacific Ry. Co.	Appeal
No. 679. Chicago, Rock Island & Pacific, Ry. Co., Appellant, v. Knott et al.	and Cross-appeal.
No. 680. Knott et al., Appellants, v. St. Louis, Kansas City & Colorado Ry. Co.	Appeal
No. 681. St. Louis, Kansas City & Colorado Ry. Co., Appellant, v. Knott et al.	and Cross-appeal.

No. 682. Knott et al., Appellants, v. Kansas City Southern Ry. Co.	Appeal
No. 683. Kansas City Southern Ry. Co., Appellant, v. Knott et al.	and Cross-appeal.
No. 684. Knott et al., Appellants, v. St. Louis & Hannibal Ry. Co.	Appeal
No. 685. St. Louis & Hannibal Ry. Co., Appellant, vs. Knott et al.	and Cross-appeal.
No. 686. Knott et al., Appellants, v. Missouri Pacific Ry. Co.	Appeal
No. 687. Missouri Pacific Ry. Co., Appellant, v. Knott et al.	and Cross-appeal.
No. 688. Knott et al., Appellants, v. St. Louis, Iron Mountain & Southern Ry. Co.	Appeal
No. 689. St. Louis, Iron Mountain & Southern Ry. Co., Appellant, v. Knott et al.	and Cross-appeal.
No. 690. Knott et al., Appellants, v. Missouri, Kansas & Texas Ry. Co.	Appeal
No. 691. Missouri, Kansas & Texas Ry. Co., Appellant, v. Knott et al.	and Cross-appeal.
No. 692. Knott et al., Appellants, v. Quincy, Omaha & Kansas City R. R. Co.	Appeal
No. 693. Quincy, Omaha & Kansas City R. R. Co., Appellant, v. Knott et al.	and Cross-appeal.
No. 694. Knott et al., Appellants, v. Wabash R. R. Co.	Appeal
No. 695. Wabash R. R. Co., Appellants, v. Knott et al.	and Cross-appeal.
No. 696. Knott et al., Appellants, v. St. Joseph & Grand Island Ry. Co.	Appeal
No. 697. St. Joseph & Grand Island Ry. Co., Appellant, v. Knott et al.	and Cross-appeal.

No. 698. Knott et al., Appellants, v. Kansas City Clinton & Springfield Ry. Co.	Appeal
No. 699. Kansas City, Clinton & Springfield Ry. Co., Appellant, v. Knott et al.	and Cross-appeal.
No. 700. Knott et al., Appellants, v. Chicago Great Western Ry. Co.	Appeal
No. 701. Chicago Great Western Ry. Co., Appellant, v. Knott et al.	and Cross-appeal.
No. 702. Knott et al., Appellants, v. Chicago, Milwaukee & St. Paul Ry. Co.	Appeal
No. 703. Chicago, Milwaukee & St. Paul Ry. Co., Appellant, v. Knott et al.	and Cross-appeal.
No. 704. Knott et al., Appellants, v. Chicago & Alton R. R. Co.	Appeal
No. 705. Chicago & Alton R. R. Co., Appellant, v. Knott et al.	and Cross-appeal.

ANSWER TO AND SUGGESTIONS IN OPPOSITION TO THE MOTION OF CROSS-APPELLANTS (THE RAILROADS) TO ADVANCE THE ABOVE SEVENTEEN APPEALS AND SEVENTEEN CROSS-APPEALS.

Now come John A. Knott, H. R. Oglesby, Frank A. Wightman, Railroad and Warehouse Commissioners of Missouri, and Elliott W. Major, Attorney-General of said State, appellants in the above seventeen appeals, same being the even numbered cases, beginning with case No. 672 and being appellees in the cross-appeals taken by the various railroads, same being the odd-numbered cases, beginning with No. 673, and say that cases Nos. 672 to 705, inclusive, of the October term docket, 1911, of the Supreme Court of the United States, represent the appeals and cross-appeals taken

in seventeen cases involving the validity and constitutionality of the two-cent passenger fare law and five separate maximum freight rate acts of the State of Missouri.

The trial court held all of said legislative enactments invalid and unconstitutional on account of being confiscatory and therefore violative of the Fourteenth Amendment of the Federal Constitution, and granted said roads, as complainants, the entire relief prayed for by said roads in their bill and amended and supplemental bills, and taxed the costs against the complainant in the bills, and defendants half and half. Appellants John A. Knott et al., in the said seventeen appeals, present the following reasons and suggestions in opposition to the motion of the cross-appellants (the railroads) in the above seventeen cross-appeals to advance said appeals and cross-appeals.

I.

Because if said seventeen appeals and said seventeen cross-appeals, making thirty-four cases, are advanced, it would be a physical impossibility for the State officers, the appellants in the said seventeen appeal cases, to brief, prepare and submit said appeals and cross-appeals to this Honorable Court. That case No. 130 of this docket, being the case of John A. Knott et al., appellants, v. The Chicago, Burlington & Quincy Railroad Company, is a case involving the validity of the same legislative acts as the above seventeen cases involved. This court has and can take notice of the very great labor attending the preparation and presentation of these cases, and that the appellants' briefs in said Burlington cases cover something like seven hundred pages. To advance said cases and require same to be briefed, presented and submitted now would be imposing a task beyond human possibilities.

II.

Because to grant the motion and advance the cases would be tantamount to depriving John A. Knott et al., appellants in said seventeen cases, of their right and benefit of appeal in each case. Said appellants, Knott et al., when they took an appeal in each of said cases, had a right to rely upon the rule and the law that their appeals would be docketed and heard in regular order, thus giving to them ample time to prepare the briefs in each case and submit same fully and properly to this court. That should they accomplish their tasks and have same briefed before being reached upon regular call, then they, the said Knott et al., appellants, could have same advanced upon their own motion, but that same could not be advanced upon the motion of cross-appellants over their objection and protest.

III.

Because the right to file and present the motion to advance said appeals rests in appellants in these cases, and the same does not, under the court's findings and decrees, rest in the cross-appellants. The cross-appellants (the railroads) were granted by the trial court all the relief for which they prayed in the bill of complaint and amended and supplemental bills of complaint, and the trial court held all of said legislative enactments unconstitutional and void. The cross-appellants appealed from the order of the court adjudging one-half of the costs against them, and an appeal from anything else would raise simply moot questions. Having secured, at the hands of trial court, judgments and decrees granting to them all the relief prayed for, they are in no position to ask for the advancement of these appeals and cross-appeals, totaling thirty-four cases.

IV.

Because the records in the above appeals and cross-appeals have not been printed by the clerk of the Supreme Court of the United States by reason of the fact that the cross-appellant in said cases failed [redacted] to deposit with the clerk of said court the amount of their estimates and necessary to be made by said cross-appellants in said seventeen cases, although they were notified so to do by Hon. James H. McKenney, clerk of the Supreme Court of the United States, and were so notified by him on July 8, 1911 That the amount which cross-appellants were called upon by him to deposit under the estimate of said clerk, was $4,200.00, same being one-half of the estimated amount, and same being the amount which they should deposit under the rule.

Appellants in said seventeen appeals, John A. Knott et al., inform the court that they received notice of their estimates, as made by the clerk of this Honorable Court, for their one-half of deposits to be made in said cases and did later, on July 18, 1911, deposit with the clerk of this court the sum of $4,200.00, the amount called for by said clerk, and being the proper and necessary deposit from appellants in said cases. Said appellants Knott et al., further say that said cross-appellants (the railroads) have not made their said deposit to print said record to this day, unless said cross-appellants have made same within the last few weeks.

V.

Because said motion to advance is made by said cross-appellants (the railroads) in said cases for the purpose and with the intention of so hampering the State and its officers for time in the preparation of their briefs that they would be unable to fully present each particular case to the court,

and for the further purpose of bringing about confusion and beclouding of facts and questions presented and involved in the several cases.

While a great amount of evidence taken in the Burlington case, No. 130, this docket, applies equally to these seventeen appeals, and seventeen cross-appeals, yet, there is a great amount of evidence applicable *only to each particular case*, bearing upon the revenue, expenses, net profits, etc., in each particular case, together with scores of exhibits applicable to and introduced in each particular case, and which necessarily requires great labor and much time in the preparation of a brief in each case.

VI.

Because case No. 130 of this docket, same being John A. Knott et al., appellants, v. Chicago, Burlington & Quincy Railroad Company, and case No. 134, Chicago, Burlington & Quincy Railroad Company, appellant, v. John A. Knott et al., said cases being appeal and cross-appeal, involve the validity of the same passenger act and maximum freight rate laws as are involved in the seventeen appeals and seventeen cross-appeals above styled.

That both said appeal and cross-appeal, Nos. 130 and 134, were advanced upon the motion of John A. Knott et al., appellants, and were argued and submitted to this Honorable Court on October 13, 1910, and this court, after having same under submission for several months, did, on its own motion in April, 1911, order said Burlington cases restored to the docket for re-argument. The court not having assigned nor set a day certain for the re-argument and re-submission, there is now pending and submitted a motion to advance said cases, Nos. 130 and 134, same being the Burlington appeal and cross-appeal, and to have same set for re-argument and re-submission on October 10, 1911, or as

soon thereafter as the business and the convenience of this court will permit.

VII.

Because doubtless the views of this court as they would be expressed in the opinion to be rendered in the Burlington appeal and cross-appeal, Nos. 130 and 134, and which have once been submitted and are ready for submission again, will be instructive, helpful and persuasive upon the future action of the parties in the said seventeen appeals and seventeen cross-appeals just recently taken, because some principles of law are involved which will apply to all the cases. And this is true, although as to the facts each case stands and must rest upon its own particular facts and evidence. (Chicago Grand Trunk Railway Co. v. Wellman, 143 U. S. 739; St. Louis, San Francisco Railroad Company v. Gill, 156 U. S. 649; Smyth v. Ames, 169, U. S. 466.)

VIII.

Because ten cases (or counting the Chicago, Rock Island & Pacific Ry. Co., and the St. Louis, Kansas City & Colorado cases as one, these two railroads being under the same management), nine cases were actually tried. One or more of the other cases were by stipulation and order of court (printed record 4723, 4724, 4686, 4712 and 4713 in Burlington cases). To abide the result in one or more of the nine cases tried. The Burlington cases Nos. 130 and 134, this docket, same being appeal and cross-appeal, are decisive of the Chicago & Alton Railroad Company cases, and the Wabash Railroad Company cases, etc., etc.

IX.

Because each case must stand or fall upon its own facts and evidence, as each case was submitted and passed upon

separately by the trial court and upon its own merits, and with a separate finding of facts on the evidence applicable and peculiar to each separate case and separate decrees entered in each of the cases. Each case is review here *de novo*, and is determined by the evidence and proof or want of proof in each case, and must stand or fall on its own merits.

X.

Because as each case has its separate pleadings and evidence peculiar to that case, and its separate decree and its separate facts found by the court, it would be an impossibility for appellants, John A. Knott et al., to brief and submit at an early date said cases sought to be advanced, and the granting of same would hamper the said appellants in their said appeals, and they would not be able to present to this Honorable Court said appeals upon the merits and with that fullness, deliberation and accuracy to which said appellants, Knott et al., are entitled in said cases.

XI.

Because the cross-appellants have opposed at every step the early submission of the said Burlington cases separate from these cases, although there is no relation between the Burlington cases and these. Counsel for cross-appellants have three times sought to retard the submission of the Burlington cases, and done no doubt that it might bring about confusion in the end in the presentation of the cases and issues of fact.

The examination of such questions of fact as are involved in each case requires great labor upon the part of the court, and were it even possible to submit these cases before or with the Burlington cases, it would burden the court and tend only to confuse rather than to afford or furnish the court with additional light or information.

For the reasons herein assigned we ask this Honorable Court to refuse to grant the motion of the cross-appellants to advance these seventeen appeals and seventeen cross-appeals to the end that the appellants, Knott et al., in the appeals may have their proper time to prepare and present the cases upon the merits and sustain the validity of the Missouri two-cent passenger fare and maximum freight rate laws.

Respectfully submitted.

ELLIOTT W. MAJOR,
Attorney-General of Missouri.

Counselor for Appellants in Cases Nos. 672, 674, 676, 678, 680, 682, 684, 686, 688, 690, 692, 694, 696, 698, 700, 702, 704; and Counselor for Appellees in Cases Nos. 673, 675, 677, 679, 681, 683, 685, 687, 689, 691, 693, 695, 697, 699, 701, 703 and 705.

SANFORD B. LADD,
Of Counsel.

V

MISSOURI RATE CASES.[1]

APPEALS AND CROSS APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

Nos. 9, 12, argued October 12, 13, 1910; Ordered for reargument April 10, 1911; Reargued April 1, 2, 3, 1912. Nos. 339, 340, 341, 342, 345, 346, 349, 350, 351, 352, 357, 358, 365, 366, 367, 368, argued April 1, 2, 3, 1912. —Decided June 16, 1913.

These suits were brought to restrain the enforcement of the freight-rate and passenger-fare acts of the State of Missouri, passed in 1907. The question of interference with interstate commerce is the same

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[1] Docket titles of these cases are as follows:

No. 9. Knott *et al.*, Railroad and Warehouse Commissioners, *v.* Chicago, Burlington & Quincy R. R. Co.

No. 12. Chicago, Burlington & Quincy R. R. Co. *v.* Knott &c.

No. 339. Knott &c. *v.* St. Louis & San Francisco Railroad Co.

No. 340. St. Louis & San Francisco Railroad Co. *v.* Knott.

No. 341. Knott *v.* Atchison, Topeka & Santa Fe Railway Co.

No. 342. Atchison, Topeka & Santa Fe Railway Co. *v.* Knott.

No. 345. Knott *v.* Chicago, Rock Island & Pacific Railway Co.

No. 346. Chicago, Rock Island & Pacific Railway Co. *v.* Knott.

No. 349. Knott *v.* Kansas City Southern Railway Co.

No. 350. Kansas City Southern Railway Co. *v.* Knott.

No. 351. Knott *v.* St. Louis & Hannibal Railway Co.

No. 352. St. Louis & Hannibal Railway Co. *v.* Knott.

No. 357. Knott *v.* Missouri, Kansas & Texas Railway Co.

No. 358. Missouri, Kansas & Texas Railway Co. *v.* Knott.

No. 365. Knott *v.* Kansas City, Clinton & Springfield Railway Co.

No. 366. Kansas City, Clinton & Springfield Railway Co. *v.* Knott.

No. 367. Knott *v.* Chicago Great Western Railway Co.

No. 368. Chicago Great Western Railway Co. *v.* Knott.

There were altogether thirty-six Missouri Rate Cases of which eighteen were disposed of by this opinion. In eight of the last mentioned suits, it was stipulated in the court below that they should abide by the decision reached in other cases. Of the remaining ten, two were consolidated into one for purposes of trial, see p. 512, *post*, leaving nine

as that presented in the *Minnesota Rate Cases*, *ante*, p. 352, and the decision is the same.

Where an act fixing rates and imposing penalties for violation is repealed by a subsequent act which saves the penalties and simply substitutes other rates, the essential features of a controversy involving the constitutionality of the statute are the same; and, under the circumstances of this case, a supplemental bill may be filed setting up the new and additional legislation and praying relief in regard thereto.

Where the ends of justice are advanced and no substantial rights of

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suits which were submitted to the court below upon the proofs. The court below enjoined the rates as being confiscatory.

On the appeals in these nine suits (there being an appeal and cross-appeal in each case) this court sustains the rates as to six companies, to wit: the Chicago, Burlington & Quincy, the Atchison, Topeka & Santa Fe, the Kansas City Southern, the Missouri, Kansas & Texas, the Chicago, Rock Island & Pacific (including the St. Louis, Kansas City & Colorado), and the St. Louis & San Francisco.

In the cases of these companies, the decrees are reversed and the cases remanded with instructions to dismiss the bills, respectively, without prejudice.

The court holds the rates to be confiscatory in three of the nine cases whose appeals were heard, to wit: the St. Louis & Hannibal, the Kansas City, Clinton & Springfield and the Chicago Great Western.

In these three cases, the decrees are affirmed, with the modification that the Railroad Commissioners and the Attorney-General of the State, may apply to the court whenever it shall appear that by reason of a change in circumstances the rates fixed by the State's acts are sufficient to yield reasonable compensation.

Under the stipulations made in the court below, the decision sustaining the rates as to the six companies above-mentioned will also apply to six other companies, to wit: the St. Louis Southwestern, the Missouri Pacific, the St. Louis, Iron Mountain & Southern, the Wabash, the Chicago, Milwaukee & St. Paul, and the Chicago & Alton, see p. 509, *post*.

The decision in the case of the Chicago Great Western Company, holding the rates to be confiscatory, will also apply by virtue of the stipulations made below to the Quincy, Omaha & Kansas City Railroad Company and the St. Joseph & Grand Island Railway Company. For other cases involving Missouri rates, see pp. 509, 512, *post*.

the objectors are violated, this court will not interfere with the reasonable discretion of the trial judge in a matter of practice.

Where the Federal court already has jurisdiction of an action to determine the constitutionality of a state statute fixing rates, that jurisdiction is not ousted by a substitution of rates by the legislature, because the State files a bill to enforce the new rates; the Federal court retains jurisdiction under a supplemental bill.

Minnesota Rate Cases, *ante*, p. 352, followed to effect that the legislative acts of Missouri establishing maximum rates for transportation wholly intrastate are not unconstitutional as an unwarranted interference with interstate commerce.

Legislative acts of a State establishing maximum freight and passenger rates for wholly intrastate commerce will not be declared unconstitutional under the Fourteenth Amendment as confiscatory in the absence of clear and convincing proof as to the value of the property used by the carrier and on which returns are based. General evidence as to assessed valuations without showing the method of appraisement are insufficient, either as to value of property or apportionment of expenses between interstate and intrastate business.

Minnesota Rate Cases, *ante*, p. 352, followed, disapproving the establishment of values of property used in interstate and intrastate business by apportionment based on the gross revenue received from each class of business.

Where a number of different carriers bring separate suits to enjoin the enforcement of railway rates established by a state statute on the ground that the rates are unconstitutional as confiscatory, the bills can be sustained as to those carriers which actually prove that the rates are confiscatory as not yielding a return on their property, although dismissed as to other carriers which fail to offer clear and convincing proof to that effect.

Where a statute is valid on its face, each person attacking it as depriving him of his property without due process of law must show it does so deprive him; he cannot rely on the fact that it deprives others of their property without due process of law.

168 Fed. Rep. 317, affirmed in certain cases and reversed in others.

APPEALS and cross-appeals from decrees of the Circuit Court entered March 8, 1909, as amended April 17, 1909, adjudging the maximum freight rate acts passed by the legislature of the State of Missouri, April 15, 1905, Laws, p. 102, and March 19, 1907, Laws, p. 171, and the maxi-

mum passenger fare act passed February 27, 1907, Laws, p. 170, to be confiscatory, and enjoining their enforcement. 168 Fed. Rep. 317.

Eighteen suits, brought by as many railroad companies, were begun in June, 1905, assailing the act of April 15, 1905 (effective June 16, 1905), which prescribed maximum rates for intrastate transportation of certain commodities in carload lots. The members of the Board of Railroad Commissioners, the Attorney-General of the State, and representative shippers, were made defendants.

Preliminary injunction was granted in each case, demurrers to the bills were overruled, answers were filed and in March, 1906, the cases were referred to a master to take evidence and report. The Master proceeded, by agreement, to take testimony in three of the cases.

While this reference was pending, the legislature in 1907, passed the following acts:

(1) That of February 27, 1907, fixing a maximum passenger fare within the State of two cents a mile, for railroads over forty-five miles in length.

(2) That of March 19, 1907, repealing the act of April 15, 1905, and prescribing new maximum intrastate rates for specified commodities in carload lots, the rates being higher in certain instances than those of the former act. It also repealed an act passed April 15, 1905 (not mentioned in the original bills) relating to rates on stone, sand and brick, and made new rates therefor. It was provided that the repeal should not relieve any railroad company from liabilities and penalties previously incurred.

(3) That of March 19, 1907 (Laws 1907, p. 187), fixing maximum rates for fruit in carload lots.

(4) That of April 4, 1907 (Laws 1907, p. 176), requiring carriers of live stock in carload lots to carry the shipper or his agent free of charge. (This statute was held unconstitutional by the state court and needs no further notice. *McCully* v. *Railroad Co.*, 212 Missouri, 1.)